THE LOUISIANA JUVENILE DEFENDER TRIAL PRACTICE MANUAL

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JUVENILE JUSTICE PROJECT OF LOUISIANA
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THE LOUISIANA JUVENILE DEFENDERS TRIAL PRACTICE MANUAL

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DEFENDER TRIAL PRACTICE MANUAL

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If we don't stand up for children, then we don't stand up for much.

— MARIAN WRIGHT EDELMAN

PART I
JUVENILE DELINQUENCY COURT: AN OVERVIEW

CHAPTER 1

THE HISTORY AND PURPOSE OF JUVENILE COURT

Representing children and youth in delinquency proceedings is both rewarding and challenging because of the unique nature of juvenile court. The reward lies in the promise that, with the proper guidance, treatment and care, children can become successful adults without bearing the stigma that often follows from an adult conviction. The challenge lies in the conflicting philosophies of juvenile court: zealous representation of the child versus the best interest of the child. This conflict can present a barrier to effective representation[1] by placing pressure on defenders to both advocate for their client's best interests and personal interests. To assist defenders in developing an effective juvenile practice, this chapter presents an overview of the history and purpose of juvenile court and the development of Louisiana's juvenile justice system.

I. THE ORIGIN OF THE JUVENILE COURT

A. The Doctrine of *Parens Patriae*

The doctrine of *parens patriae* is taken from chancery practice to describe the power of the state to act in place of the parent for the purpose of protecting the property interests and the person of a child.[2] The doctrine provides for the state's role as guardian to protect a child who cannot protect herself. The United States Supreme Court discussed the doctrine in *In re Gault,* its seminal case regarding juvenile due process rights:

> The right of the state, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right "not to liberty but to custody." He can be made to attorn to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions—that is, if the child is "delinquent"—the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the "custody" to which the child is entitled.[3]

The Court again addressed *parens patriae* in *Schall v. Martin*[4], stating:

1 Gabriella Celeste & Patricia Puritz, eds., The Children Left Behind: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Louisiana, American Bar Association (June 2001).
2 *In re Gault*, 387 U.S. 1, 16 (1967).
3 *Id.* at 17.
4 *Schall v. Martin,* 467 U.S. 253, 265 (1984).

> Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*.... In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's "*parens patriae* interest in preserving and promoting the welfare of the child."[5]

Prior to acceptance of the *parens patriae* doctrine, delinquent behavior was addressed within the family. Children generally worked within the family unit, and the family was responsible for providing discipline, education and socialization.[6] Poor children were often sent to work with other families as apprentices and indentured servants, and the apprentice families became responsible for the children *in loco parentis,* or in the place of the natural parent.[7]

The industrial revolution changed the labor system and displaced families from their land and resulted in migration to urban centers.[8] These changes in economic structure brought poverty, weakened family ties and led to an increase in delinquent behavior.[9] Children and youth who committed crimes began to be sent to adult jails and workhouses.[10]

During the 1800s, the first juvenile prisons were created by a group of philanthropists called the Society for the Prevention of Pauperism.[11] The group believed that incarcerating children and youth in adult jails would worsen their behavior and that judges might acquit children and youth to avoid incarcerating them in abhorrent adult jail conditions.[12]

The new prisons for juvenile offenders were called Houses of Refuge and were designed as educational facilities.[13] The first House of Refuge opened in New York in 1825.[14] Houses of Refuge soon spread across the country and became residences for delinquent, neglected and dependent children.[15] The traditional view that the family would provide discipline, education and socialization was replaced with the idea that the state would, as "*common guardian of the community,*" take the place of the child's natural parents.[16] Children whose parents could not provide for them because of poverty or unemployment or were simply "not suitable" were placed in Houses of Refuge.[17]

5 *Id.* at 266.
6 Barry Krisberg & James F. Austin, Reinventing Juvenile Justice 14 (1993).
7 *Id.* at 13.
8 *Id.* at 14–15.
9 *Id.* at 15–16.
10 *Id.* at 17.
11 *Id.* at 24.
12 *Id.* at 17.
13 *Id.*
14 *Id.*
15 *Id.* at 17.
16 *Id.* at 18 (emphasis added).
17 *Id.*

By the mid-1800s, state and municipal governments began taking over the administration of institutions for juvenile delinquents.[18] By the end of the century, Houses of Refuge evolved into reformatories.[19] Even though reformatories dominated the landscape of juvenile delinquency prevention at the time, there were reformers who did not believe in the institutionalization of children. One reformer, John Augustus, a shoe cobbler in Boston, supervised children and youth who were released by the court on bail.[20] Augustus paid court costs, provided clothing and shelter and tried to find the children jobs in the community.[21] In essence, Augustus was one of the first probation officers.

B. The Creation of a Juvenile Court

The first juvenile court was created during the Progressive Era, a time of major social and structural change from the late 1800s to the early 1900s.[22] At the time, Houses of Refuge and reformatories had been available for decades, yet delinquency continued to rise.[23] There was growing doubt about the success of the reformatories in reducing delinquency, and courts began to question the unlimited use of the *parens patriae* doctrine without providing constitutional protections.[24]

Illinois created the first juvenile court in 1899[25] because the state had almost no institutions for the care of delinquent children and youth.[26] The Illinois Juvenile Court Act extended the *parens patriae* philosophy of the reform schools to the court system, thereby giving a special juvenile court jurisdiction over neglected, dependent and delinquent children under the age of 16.[27] The definition of delinquency was broad, encompassing a violation of any state law, city ordinance or village ordinance.[28] The court was given jurisdiction over any child or youth who was incorrigible, truant, or who lacked the proper parental supervision.[29] The Act also established the following:

- a rehabilitative purpose;
- a policy of confidentiality for records of the court to minimize stigma;
- separation of juveniles from adults when incarcerated or institutionalized;
- absolute prohibition against the detention of children under 12 in jails;

18 *Id.* at 23.
19 Robert E. Shepherd, Jr., *Still Seeking the Promise of Gault: Juveniles and the Right to Counsel,* ABA Criminal Justice Magazine, Summer 2003, at 23.
20 *Id.* at 23.
21 *Id.*
22 *Id.* at 27.
23 *Id.* at 29.
24 *Id.*
25 *In re Gault,* 387 U.S. 1, 14 (1967).
26 Krisberg & Austin, *supra* note 6, at 29.
27 Shepherd, *supra* note 19, at 2.
28 Krisberg & Austin, *supra* note 6, at 30.
29 *Id.*

- procedural informality within the court.[30]

The new Illinois juvenile court existed alongside the criminal court, but was a totally different institution.[31] The court, like other early juvenile courts, allowed the state to take on the role of guardian through *parens patriae*.[32] *Parens patriae* dictated that proceedings in juvenile court be informal and civil in nature, rather than criminal. Civil proceedings allowed a judge to consider a broad range of information about the child separate and apart from the actual offense and gave the courts more authority and supervision over a child.[33] Juvenile courts did not ascertain whether the child was "guilty" or "innocent," but "[w]hat is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."[34]

The juvenile court model spread across the nation and by 1909, 10 states had established children's courts,[35] including Louisiana.

30 Shepherd, *supra* note 19, at 2.
31 *Id.* at 23.
32 Juvenile Justice FYI, *Information on the History of America's Juvenile Justice System,* www.juvenilejusticefyi.com/history_of_juvenile_justice.html (last visited Feb. 5, 2007).
33 *Id.*
34 *In re Gault,* 387 U.S. 1, 15 (1967).
35 Krisberg & Austin, *supra* note 6, at 30.

Under our Constitution, the condition of being a boy does not justify a kangaroo court.[36]

C. The Evolution of Juvenile Court

The juvenile court functioned for nearly 70 years with little constitutional oversight and, except for a few jurisdictions, without the involvement of lawyers.[37] However, in 1967, the United States Supreme Court decided *In Re Gault,* finding that under the guise of *parens patriae,* juvenile courts exercised unbridled and often arbitrary discretion over children in the juvenile justice system and that without constitutional protection, the juvenile courts were not achieving their purported rehabilitative goal.[38] The Court stated:

> The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.[39]

The Court viewed *parens patriae* as no more than a convenient means of depriving juveniles of constitutional protections while stripping them of their liberty.[40] In the case *In re Gault,* Gerald Gault, a minor, was arrested for making a lewd phone call. Without notice to his parents, he was questioned by police, adjudicated delinquent without witnesses being present and ordered to spend eight years at a training school. The Court found the consequences of incarcerating a child to be significant[41] and that the term "delinquent" "has come to involve only slightly less stigma than the term 'criminal' as applied to adults."[42] The Court curbed the juvenile court judges' unbridled discretion through the imposition of procedural due process and the right to counsel.[43]

In subsequent cases, the Supreme Court imposed additional due process on juvenile court proceedings, holding that juveniles must be proven guilty beyond a reasonable doubt[44] and that the Double Jeopardy Clause prevents a juvenile court from

36 *In re Gault,* 387 U.S. at 28.
37 Shepherd, *supra* note 19, at 23.
38 387 U.S. 1 (1967).
39 *Id.* at 18.
40 *Id.* at 17.
41 *Id.* at 27.
42 *Id.* at 23.
43 *Id.* at 41.
44 *In re Winship,* 397 U.S. 358 (1970).

transferring a juvenile to adult court after previously finding her delinquent for the same crime.[45] The Court stopped short, however, of granting children all due process rights granted adults facing criminal charges. For instance, the Court has held that the right to a jury trial is not required in juvenile court,[46] that a juvenile does not invoke her Miranda rights by requesting to see her probation officer,[47] and that the use of preventative detention awaiting trial is not unconstitutional.[48]

D. The Juvenile Court Becomes More Criminal in Nature

Juvenile courts around the country changed dramatically during the late 1980s and early 1990s.[49] Nearly every state abandoned the non-criminal treatment of children and youth by transforming their juvenile courts into smaller versions of adult court.[50] Legislatures also broadened the capacity of the state to transfer youth directly to adult criminal court.[51] In Louisiana, the legislature abandoned the confidentiality of juvenile proceedings by opening to the public cases involving crimes of violence.[52]

The evolving punitive philosophy has eroded the idea that the juvenile court is unique and informal. The Louisiana Supreme Court has often found itself in the position of deciding how much of the unique nature of the juvenile court can be eroded before due process requires that juveniles be afforded all the procedural guarantees mandated for adult criminals.[53] Today, juveniles charged in delinquency actions in Louisiana are entitled to all of the constitutional protections of adults except the right to a jury trial.[54]

II. JUVENILE COURT IN LOUISIANA

Louisiana's juvenile court history parallels the national history in many ways. Prior to the creation of juvenile court, children as young as seven were incarcerated with adults in the Louisiana State Penitentiary.[55] Reformers in Louisiana were appalled by adult court procedures and the penalties imposed on children, including long prison sentences served in jails with hardened criminals.[56]

In 1908, the Louisiana General Assembly constructed a separate juvenile reformatory—the State Reformatory—and enacted legislation that created special proce-

45 *Breed v. Jones,* 421 U.S. 519 (1975); *Swisher v. Brady,* 438 U.S. 204 (1978).
46 *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971).
47 *Fare v. Michael C.,* 442 U.S. 707 (1979).
48 *Schall v. Martin,* 467 U.S. 253 (1984).
49 Shepherd, *supra* note 19, at 26.
50 *Id.*
51 *Id.*
52 *In re C.B., et al.,* 97-2783 (La. 03/11/98); 708 So.2d 391, 396; La. Child. Code Ann. art. 407(A) (2006); La. Child. Code Ann. art. 879(B) (2005); *see also* La. Rev. Stat. § 14:2(13) (2006).
53 *In re C.B.,* 708 So.2d at 396.
54 *Id.*
55 *History of America's Juvenile Justice System, supra* note 32; *In re C.B,* 708 So.2d at 399.
56 *In re Gault,* 387 U.S. 1, 14 (1967).

dures for a juvenile court system. The State Reformatory was constructed as a separate branch of the State Penitentiary system and housed juveniles between the ages of seven and 17.[57] The juvenile court legislation instructed judges presiding over juvenile cases to commit a child found guilty of a delinquency charge to the new juvenile reformatory and not the State Penitentiary.[58] This legislation created a separate structure for juveniles in which children would be reformed, not punished.[59] Louisiana developed its juvenile court system on the premise that treatment, supervision and control are the goals of the court, rather than punishment.[60] The purpose of juvenile court in Louisiana is:

> [T]o accord due process to each child who is accused of having committed a delinquent act and...to insure that he shall receive, preferably in his own home, the care, guidance, and control that will be conducive to his welfare and the best interests of the state and that in those instances when he is removed from the control of his parents, the court shall secure for him care as nearly as possible equivalent to that which the parents should have given him.[61]

Currently in Louisiana, courts exercising juvenile jurisdiction have original jurisdiction over children and minors under the age of 17 involved in delinquency proceedings, unless the child's age and alleged offense are such that the criminal court has exclusive original jurisdiction or if the child's age and alleged offense permit the District Attorney to institute a waiver of juvenile jurisdiction to the criminal court.[62] Juvenile court jurisdiction over a child can extend until the child is 21 years old. If a child commits a crime while under juvenile court supervision but after reaching the age of 17, then she will be prosecuted as an adult for the new offense. [63]

There are four specialized juvenile courts in Louisiana created by law and located in Caddo, Orleans, Jefferson and East Baton Rouge Parishes. These specialty courts have original juvenile jurisdiction. In all other parishes, a district court, parish court or city court exercises juvenile jurisdiction.[64] Some parishes, such as in Calcasieu, designate individual courts to hear juvenile cases by local rule.[65] A court with juvenile jurisdiction in Louisiana may exercise its jurisdiction for purposes of disposition in a case that has been transferred from another state.[66]

57 *In re C.B.*, 708 So.2d at 399.
58 *Id.*
59 *Id.*
60 *State v. Brown,* 03-2788 (La. 07/06/04); 879 So.2d 1276, 1288; *In re C.B.*, 708 So.2d at 395-97.
61 La. Child. Code Ann. art. 801 (2006).
62 La. Child. Code Ann. art 303(1) (2006).
63 *State v. Emerson,* 345 So.2d 1148 (La. 1977), *rehearing denied*, 345 So.2d 1148, 1153.
64 La. Child. Code Ann. art. 302 (2006).
65 Rules for Louisiana District Courts and Numbering Systems for Louisiana Family and Domestic Relations Courts and Juvenile Courts, Rule 23 (Calcasieu).
66 La. Child. Code Ann. art. 304 (2006).

III. CONCLUSION

The history and development of juvenile courts provides an understanding of the intention and purpose of providing a separate justice system for children. An appreciation that children are different from adults and should be treated differently when accused of committing illegal acts reaches back in history and should be constantly acknowledged and promoted by juvenile defenders.

CHAPTER 2

THE ROLE OF DEFENSE COUNSEL IN JUVENILE COURT

Juvenile delinquency cases are very complex, and a specialized force of advocates is needed to ensure that justice is served for children. Juvenile defenders need be aware not only of the procedural rules and constitutional criminal procedures of the adult court system, but also of the enhanced protections for children under the laws of the United States and Louisiana.

Children have enhanced rights, including the right to rehabilitation if incarcerated[1] and the right to be placed in the least restrictive environment.[2] Juvenile defenders need to have knowledge about adolescent development and mental health needs in order to ensure that their clients' rights are honored by the system. Juvenile defenders must also have a special understanding of competency and of a child's ability to understand the court process. New research on child and adolescent development is crucial to this understanding.

Representing children and youth in delinquency proceedings is rewarding and challenging. Juvenile defenders are in a unique position to impact the lives of the children and youth they represent. Effective advocacy can result in the provision of needed services for children, can decrease unnecessary detention and can facilitate a child or youth's successful transition into adulthood. Juvenile defenders must provide competent representation, communicate with young clients, preserve their confidences, avoid conflicts, and provide zealous advocacy.

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1 Federal courts have repeatedly held that where "the purpose of incarcerating juveniles in a state training school is treatment and rehabilitation, due process requires that the conditions and programs...must be reasonably related to that purpose." *Alexander S. v. Boyd,* 876 F. Supp. 773, 796 (D.S.C. 1995); *Martarella v. Kelley,* 349 F. Supp. 575, 585 (S.D.N.Y. 1972); *Pena v. New York State Division for Youth,* 419 F. Supp. 203, 206-07 (S.D.N.Y. 1976); *State in the Interest of S.D.*, 2002-0672 (La. App. 4 Cir. 11/21/02); 832 So.2d 415, 433-34 (citing *Morgan v. Sproat,* 432 F. Supp. 1130, 1135 (S.D. Miss. 1977)). "The Due Process Clause of the Fourteenth Amendment to the United States Constitution 'requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.'" *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

2 La. Child. Code Ann. art. 901 (2006). Article 901 of the Louisiana Children's Code provides in relevant part:
A. In considering dispositional options, the court shall not remove a child from the custody of his parents unless his welfare or the safety and protection of the public cannot, in the opinion of the court, be adequately safeguarded without such removal.
B. The court should impose *the least restrictive disposition* authorized by Articles 897 through 900 of this Title which the court finds is consistent with the circumstances of the case, the needs of the child, and the best interest of society.
Id. (emphasis added). The Louisiana legislature has further provided:
[I]t is hereby declared to be the public policy of this state that commitment of a juvenile to the care of the department [OYS] is not punitive nor in anywise to be construed as a penal sentence, but as a step in the total treatment process toward rehabilitation of the juvenile and that, therefore, the recommendations of the department should be given careful consideration by the court in determining what is to be the best interest of the juvenile.
La. Rev. Stat. Ann. § 15:906A(2) (2006).

I. THE ROLE OF A JUVENILE DEFENDER

Like attorneys charged with representing adults charged with crimes in criminal court, juvenile defenders are obligated to provide their clients with zealous representation. However, because of the unique nature and complexities of juvenile court, lawyers representing children and youth are often conflicted about their role. Child clients are young, inexperienced and, by their very nature, apt to make poor choices, which makes it more difficult to counsel and follow the wishes of these special clients. The pervasive focus on the best interests of the child in juvenile court also presents a challenge to lawyers who understand their role as representing the expressed interests of their clients.[3] However, while the juvenile court itself is obligated to consider the best interests of the child in making its own determinations, lawyers representing children in the delinquency system serve their clients best when they serve in the role as attorneys and zealous advocates.[4]

When a child or youth is a respondent in a delinquency proceeding, traditional ethical obligations apply, and the lawyer must represent the child client as he would an adult client.[5] Counsel must let the child or youth determine the goals of the representation, preserve the client's confidences and keep the client informed about her case.[6] The lawyer must take particular care to communicate all aspects of the attorney-client relationship to the client in a manner she can understand.[7] This requires special skill and knowledge of adolescent development and communication styles.

Recently, the National Juvenile Defender Center and the American Counsel of Chief Defenders adopted *Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems,*[8] which can guide attorneys providing services to youth in delinquency court. These principles are:

> **1) Zealous Representation:** The indigent defense delivery system upholds juveniles' right to counsel throughout the delinquency process and recognizes the need for zealous representation to protect children.
>
> **2) Specialized Skill:** The indigent defense delivery system recognizes that legal representation of children is a specialized area of the law.

3 The Children Left Behind: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Louisiana (Gabriella Celeste, Juvenile Justice Project of Louisiana & Patricia Puritz, American Bar Association Juvenile Justice Center, eds., 2001) [hereinafter "Celeste and Puritz (2001)"]; The Children Left Behind: A Review of the Status of Defense for Louisiana's Children and Youth in Delinquency Proceedings (Gabriella Celeste, Juvenile Justice Project of Louisiana & Patricia Puritz, American Bar Association Juvenile Justice Center, eds., 2002) [hereinafter "Celeste and Puritz (2002)"].

4 Bruce Green & Bernardine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 Fordham L. Rev. 1281, 1296 (1996).

5 Karen A. Hallstrom, *The Ethical Challenges of Representing Children*, 46 La. B.J. 488, 489-90 (1999); Green & Dohrn, *supra* note 4, at 1294-95.

6 Green & Dohrn, *supra* note 4, at 1295.

7 *Id.*

8 National Juvenile Defender Center & the American Council of Chief Defenders (a section of the National Legal Aid and Defender Association), Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems (2005), *available at* www.njdc.info/pdf/10_Principles.pdf. These principles were developed over a one-year period through a joint collaboration, and the NLADA officially adopted them on December 4, 2004.

3) Personnel and Resource Parity: The indigent defense delivery system supports quality juvenile delinquency representation through personnel and resource parity.

4) Expert and Ancillary Services: The indigent defense delivery system utilizes expert and ancillary services to provide quality juvenile defense services.

5) Supervision and Workload: The indigent defense delivery system supervises attorneys and staff and monitors work and caseloads.

6) Professional Accountability: The indigent defense delivery system supervises and systematically reviews juvenile defense staff for quality according to national, state and/or local performance guidelines or standards.

7) Continuous Training: The indigent defense delivery system provides and supports comprehensive, ongoing training and education for all attorneys and support staff involved in the representation of children.

8) Right to Treatment: The indigent defense delivery system has an obligation to present independent treatment and disposition alternatives to the court.

9) Educational Advocacy: The indigent defense delivery system advocates for the educational needs of clients.

10) Systematic Advocacy: The indigent defense delivery system must promote fairness and equality for children.

II. ETHICAL OBLIGATIONS OF A JUVENILE DEFENDER

Legal ethics are the principles that hold lawyers accountable for professional conduct and performance. The Louisiana Code of Professional Conduct ("CPC"), or Rules of Professional Conduct, guide lawyers in executing their roles as zealous advocates for their clients and are applicable for attorneys practicing in juvenile court. Where the Rules of Professional Conduct are silent, this manual draws from guidelines found in the Institute of Judicial Administration/American Bar Association's *Juvenile Justice Standards*, hereinafter IJA/ABA Juvenile Justice Standards,[9] and the Louisiana Indigent Defense Assistance Board's *Standards on Indigent Defense*, hereinafter LIDAB Standards.[10]

9 Institute of Judicial Administration & American Bar Association, Juvenile Justice Standards (1996) [hereinafter "IJA/ABA Standards"].

10 Louisiana Indigent Defense Assistance Board, *Louisiana Standards on Indigent Defense* (Dec. 5, 2005), *available at* www.lidab.com/standards.htm (last visited Nov. 11, 2006).

Working on behalf of children and youth may create unique ethical dilemmas, as it may be challenging to rectify many situations involving young clients under the traditional code of ethics. Following is an overview of many of the ethical obligations relevant to practice in delinquency proceedings. It should be noted, however, that this list is not exhaustive; the CPC and other resources on attorney ethics should be consulted on a regular basis for questions regarding ethical obligations in your practice.

A. Competent Representation

A lawyer shall provide competent representation to a client. Competent representation in a delinquency case requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation of a child involved in the justice system.[11] Competence in the field of juvenile defense is specialized and substantially different from competence in adult representation, although many of the same trial skills and knowledge of criminal procedure are required. In order to obtain appropriate services and a just outcome for clients, lawyers must know how to interview and counsel children; must understand child development; must become educated about the role of culture, race, ethnicity and class in the choices that a child client might make; and must be conversant with the work of social workers and psychologists and know how to work as a team with these and other non-lawyer professionals.[12]

B. Communication

Every child client is different, and the lawyer's job is to find out who her client is beyond the charge she is facing.[13] It is essential for juvenile defenders to know whether or not their client has the ability to comprehend the delinquency proceedings and assist in her defense. To identify a client's capacities and needs, juvenile defenders must be familiar with adolescent development and thoroughly interview the client and her parents, and obtain and review records to develop a quality social history.

The number one complaint among young clients is that their lawyers do not talk to them.[14] As a result, children and youth often confuse the juvenile court process and do not understand their options. A juvenile defender needs to provide information to his young client in an effective manner. This will often take considerable time, as children will need more careful explanations than many adult clients. A lawyer must clearly tell a juvenile client who he is and what he does.[15] A lawyer must give a client enough information to make informed decisions about how to proceed.[16] Young clients need to understand, as much as possible, their options and the consequences that can result from the choices they make.[17] The lawyer must give informa-

11 Louisiana Rules of Professional Conduct, Rule 1.1.
12 Green & Dohrn, *supra* note 4, at 1296.
13 Louisiana Rules of Professional Conduct, Rule 1.4(a)(1)-(5).
14 Celeste & Puritz (2002), *supra* note 3; Celeste & Puritz (2001), *supra* note 3.
15 Louisiana Rules of Professional Conduct, Rule 1.4(a)(5), (b).
16 Louisiana Rules of Professional Conduct, Rule 4(a)(1).
17 Louisiana Rules of Professional Conduct, Rule 1.0(e), 1.4(a)(2).

tion promptly, comply with reasonable requests for information from clients and continue to keep them informed about the status of their cases.[18] This will involve visits to detention centers and home visits or client phone calls prior to court hearings. Rushed conversations with children in the hallways of courthouses minutes before hearings are not an effective method of communicating complicated issues to child clients.

C. Client-Centered Representation

As long as the client's wishes are not illegal, unethical or limited by the scope of representation, a lawyer shall abide by the client's decisions concerning the objectives of representation.[19] The lawyer shall consult with the client as to how to pursue her goals.[20] If counsel believes that an ethical standard limits representation of clients in juvenile court, she may challenge that standard.[21] A lawyer may take such action on behalf of the client as she is impliedly authorized to carry out in the representation.[22] Further, a lawyer shall abide by the client's decision as to the plea to be entered and whether the client will testify,[23] perhaps one of the hardest ethical obligations when representing children. Considerations of personal and professional advantage or convenience should not influence counsel's advice or performance.[24]

What if my client cannot tell me who she is or what she wants?

Initially, a juvenile defender needs to establish whether his young client has the capacity to direct her representation.[25] A client may have a diminished capacity to make adequately considered decisions in connection with representation because of age, mental impairment, developmental disability or for some other reason.[26] If a lawyer believes that his client has a diminished capacity, he must, as much as possible, maintain a normal attorney-client relationship. However, if a lawyer believes she cannot protect the client and the client is at risk of harm, she may take reasonably necessary protective action.[27] Protective action may include consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a fiduciary, including a guardian, curator or tutor, to protect the client's interests.[28]

The Louisiana Children's Code provides several mechanisms depending on the nature of the child's incapacity. Counsel may raise the issue of competency before the

18 Louisiana Rules of Professional Conduct, Rule 1.4(a)(3), (4); *Standards Relating to Counsel for Private Parties* § 1.2(b), *in* IJA/ABA Standards, *supra* note 9.
19 Louisiana Rules of Professional Conduct, Rule 1.2(a).
20 Louisiana Rules of Professional Conduct, Rule 1.2(a).
21 *Standards Relating to Counsel for Private Parties* § 1.2(b), *in* IJA/ABA Standards, *supra* note 9.
22 Louisiana Rules of Professional Conduct, Rule 1.2(a).
23 *Id.*
24 *Standards Relating to Counsel for Private Parties* § 3.1(a), *in* IJA/ABA Standards, *supra* note 9.
25 Green & Dohrn, *supra* note 4, at 1295.
26 Louisiana Rules of Professional Conduct, Rule 1.14(a).
27 *See* Louisiana Rules of Professional Conduct, Rule 1.14(b).
28 *Id.*

court.[29] This will result in professional evaluations and a hearing to determine the client's capacity to participate in her defense. See *Chapter 10: Mental Incapacity to Proceed* for more detail on this process.

The attorney may also request appointment of a *guardian ad litem* or a CASA advocate.[30] Such advocates are responsible for acting in the best interest of the child and may advocate for needed services or judicial action that a juvenile defender may not be in a position to advocate for in her role as counsel for the child. In seeking protective action for a client, a lawyer cannot forget about her obligation of confidentiality to her client. A lawyer is authorized only to reveal information that is reasonably necessary to protect the client's interests and may not act against her client's interests.[31]

What if I do not approve of my client's decision?

Remember, your role as juvenile defender is not to impose your beliefs of what is in the best interest of the client, but to advocate for what the client wants, as long as it is not illegal, unethical or limited by the scope of your representation. Representing your client's interests does not mean you agree with or adopt your client's political, religious, social or moral views or activities, or that you agree with your client's decisions.[32] Lawyers are counselors and advisors: Talk to your client, use your professional skills to explain the consequences of the various options and to explain your recommendations. Discuss the legal, social, moral and economic factors germane to your client's case, but, in the end, abide by and advocate for her decision.[33]

D. Confidentiality

Juvenile defenders should immediately establish a relationship of trust and confidence with their young clients.[34] One way to begin that relationship is to explain to the client that a lawyer cannot reveal information relating to her representation unless she gives her informed consent.[35] Lawyers must preserve the client's confidences and secrets to the extent permissible under the law.[36] Simply put, a lawyer

29 La. Child. Code Ann. art. 832 (2005).
30 La. Child. Code Ann. art. 116 (2.2).
31 Louisiana Rules of Professional Conduct, Rule 1.14(c).
32 *Id.* at Rule 1.2(b).
33 *Id.* at Rule 2.1.
34 *Standards Relating to Counsel for Private Parties* § 3.3(a), *in* IJA/ABA Standards, *supra* note 9.
35 Louisiana Rules of Professional Conduct, Rule 1.6(a).
36 *Id.* at Rule 1.6(b); *accord Standards Relating to Counsel for Private Parties* § 3.3(d), *in* IJA/ABA Standards, *supra* note 9. Rule 1.6(b) of the Louisiana Rules of Professional Conduct states:
A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
1) to prevent reasonably certain death or substantial bodily harm;
2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.
4) to secure legal advice about the lawyer's compliance with these Rules;
5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to

cannot divulge confidential information to any other person, including the client's parents.[37]

How can I cooperate with other agencies and protect my client's confidences?

A juvenile defender must often deal with a team of professionals while advocating for young clients. There will undoubtedly be circumstances under which certain information should be shared with these professionals for the benefit of the client. IJA/ABA Standards generally recommend that the lawyer and the client cooperate with agencies only to the extent that the client benefits from that exchange. Counsel will have to judge whether or not cooperation is or will likely become inconsistent with protection of the client's legitimate interests in the proceeding or of any other rights the client may have before sharing information with professionals and service providers.[38]

What about information received from parents?

Juvenile defenders will also need to consider information obtained from the client's parents in the course of providing representation to the child. While it is important that a juvenile defender communicate with and interview her client's parents, it is also important to remember that the lawyer's duty remains to the client.

There may, however, be cases in which the lawyer should preserve the confidence of information received from a parent or guardian of a client. While a lawyer should not encourage secret communications with parents or guardians, there are cases where parents provide counsel with information and either the parent requests that the information remain confidential, or counsel determines revealing the information may be embarrassing or detrimental to a parent or the client. In either event, the lawyer should not reveal the information unless information obtained from the parent is of a nature that would conflict with the attorney's primary responsibility to the interests of his client.[39]

E. Conflicts

A child's lawyer must serve with undivided loyalty to her client to avoid the likelihood that a conflict will result. A juvenile defender should not represent more than one child or a child and his parent in a delinquency case.[40] While traditional ethical rules under the CPC do allow a defender to represent multiple clients in the same case under certain circumstances,[41] according to the IJA/ABA Standards, a con-

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respond to allegations in any proceeding concerning the lawyer's representation of the client; or
6) to comply with other law or a court order.
Id.

37 *Standards Relating to Counsel for Private Parties* § 3.3(b), *in* IJA/ABA Standards, *supra* note 9.

38 *Id.* at § 1.4.

39 *Standards Relating to Counsel for Private Parties* § 3.3(c), *in* IJA/ABA Standards, *supra* note 9.

40 Green & Dohrn, *supra* note 4, at 1295.

41 Rule 1.7(b) of the Louisiana Rules of Professional Conduct provides:
Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each af-

current conflict exists when either the representation of one client will be directly adverse to another client or there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.[42]

While dual representation is allowed under certain circumstances, the nature and complexities of representing children in delinquency proceedings do not make dual representation realistic. The representation of multiple children in a single delinquency case presents many potential conflicts: One defendant may opt to take a plea agreement and promise to testify against the other, one client's confidences may exonerate another client in the same case, the client's position in her case may change multiple times, making a seemingly conflict-free relationship with a co-defendant conflict-laden, and so on.

Are there other possible conflicts with your client?

A lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by the CPC.[43] Information relating to the representation of a client is protected as required by rules governing confidentiality.[44] A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not, thereafter, use information relating to the representation to the disadvantage of the former client, except as the CPC would permit or require with respect to a client or when the information has become generally known, or reveal information relating to the representation except as the CPC would permit or require with respect to a client.[45]

At the earliest feasible opportunity, counsel should disclose to a client any interest in or connection with the case or any other matter that might be relevant to the client's selection of a lawyer. Counsel should at the same time seek to determine whether adversity of interests potentially exists between current or past clients and, if so, should immediately seek to withdraw from representation of the client who will be least prejudiced by such withdrawal.[46]

fected client;
2) the representation is not prohibited by law;
3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
4) each affected client gives informed consent, confirmed in writing.

42 *Id.*, *accord Standards Relating to Counsel for Private Parties* § 3.2, *in* IJA/ABA Standards, *supra* note 9.
43 Louisiana Rules of Professional Conduct, Rule 1.8(b).
44 *Id.* at Rule 1.8(b)(3).
45 *Id.* at Rule 1.8(c)(1)-(2).
46 *Standards Relating to Counsel for Private Parties* § 3.2, *in* IJA/ABA Standards, *supra* note 9.

F. Advocacy

1. Diligence

A lawyer shall act with diligence and promptness in representing clients and should be prompt in all dealings with the court and with clients.[47]

2. Zealousness

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.[48] A lawyer for a child in a delinquency or a criminal proceeding, or the respondent in a proceeding that could result in incarceration, must nevertheless defend in the proceeding so as to require that every element of the case be established.[49]

3. Expeditiousness

One of the most notable differences between juvenile and criminal court is the expedited time frames in which adjudications must proceed. Juvenile defenders are obligated to enforce these limits unless the interests of the client dictate otherwise.[50]

4. Systemic Activism

Juvenile defenders are in a unique position to advocate for improvement in the juvenile justice system either through legal challenges or systemic reform. The IJA/ABA Juvenile Justice Standards and the *Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems* recommend that, in each jurisdiction, "lawyers practicing before the juvenile court should actively seek improvement in the administration of juvenile justice and the provision of resources for the treatment of persons subject to the jurisdiction of the juvenile court."[51] Improvements may include improving the delivery of indigent defense services, decreasing the use of detention, increasing available community programming for clients and creating alternatives to incarceration.

47 Louisiana Rules of Professional Conduct, Rule 1.3; *Standards Relating to Counsel for Private Parties* § 1.5, *in* IJA/ABA Standards, *supra* note 9.
48 Louisiana Rules of Professional Conduct, Rule 3.1.
49 *Id.*
50 *Id.* at Rule 3.2 ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.").
51 *Standards Relating to Counsel for Private Parties* § 1.7, *in* IJA/ABA Standards, *supra* note 9; Ten Core Principles, *supra* note 8.

[T]oday our society views juveniles...as "categorically less culpable than the average criminal."[52]

52 *Roper v. Simmons*, 543 U.S. 551, 567 (2005) (quoting *Atkins v. Virginia,* 536 U.S. 304, 316 (2002)).

CHAPTER 3

UNDERSTANDING THE JUVENILE CLIENT: AN OVERVIEW OF ADOLESCENT DEVELOPMENT

Adolescence is a time of great transition;[1] children's bodies and minds are growing rapidly and children are establishing independence, new relationships and opinions outside the family nucleus. Adolescence is a difficult period of growth not only for children and youth, but also for the adults who work with them. To ensure that juvenile defenders are able to develop working relationships and better understand their clients, this chapter discusses adolescent development in the law and describes important developmental characteristics of children and youth.

I. ADOLESCENT DEVELOPMENT IN THE LAW

The very existence of a separate juvenile court evidences the recognition in our society that children and youth have capacities that are different than adults. The United States Supreme Court has continually recognized in its decisions that children and youth are immature, vulnerable and more impulsive than adults.

In the recent landmark case, *Roper v. Simmons*,[2] the United States Supreme Court abolished the death penalty for juveniles. This momentous case recognized that children and youth are biologically, psychologically and developmentally different from adults:

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."[3] It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior."[4]

1 Angela Huebner, *Adolescent Growth and Development, Family and Child Development* (Virginia Cooperative Extension, Family & Child Development, Publication 350-850, 2000), *available at* www.ext.vt.edu/pubs/family/350-850/350-850.pdf.
2 *Simmons,* 543 U.S. 551.
3 *Simmons,* 543 U.S. at 568 (quoting *Johnson v. Texas,* 509 U.S. 350, 367 (1993)); *see also Eddings v. Oklahoma,* 455 U.S. 104, 115-16 (1982) ("Even the normal 16-year-old customarily lacks the maturity of an adult.").
4 *Id.* (quoting Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Review 339 (1992)).

> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.[5] This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.[6] The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.[7]
>
> These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult."[8] Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.[9] The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."[10]

Simmons is an extension of other Supreme Court cases recognizing the developmental characteristics of children and youth and the resulting need for enhanced protections; including the expansion of constitutional rights in some instances and increased restrictions of their freedom in others.[11]

In *Eddings v. Oklahoma,* the Court wrote:

> Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible

5 *Id.* (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.")).
6 *Id.* ("As legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting.") (quoting Lawrence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)).
7 *Id.*; *see generally* E. Erikson, Identity: Youth and Crisis (1968).
8 *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion)).
9 *Id.* (citing *Stanford v. Kentucky*, 492 U.S. 361, 395 (1989) (Brennan, J., dissenting)).
10 *Id.*; *Johnson v. Texas*, 509 U.S. 350, 368 (1993); *see also* Lawrence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003) ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.").
11 *Eddings v. Oklahoma,* 455 U.S. 104, 115 (1982); *Bellotti v. Baird,* 443 U.S. 622 (1979); *Haley v. Ohio,* 332 U.S. 596 (1948); *Gallegos v. Colorado,* 370 U.S. 49 (1962); *Schall v. Martin,* 467 U.S. 253 (1984).

than adults.[12] Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults.[13]

In *Bellotti v. Baird,* the Court explained that its rulings limiting the freedom of children to choose for themselves is "grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[14]

In *Haley v. Ohio* and *Gallegos v. Colorado,* the United States Supreme Court relied on the nature of adolescent development to find that the police violated the rights of a 15-year-old and 14-year-old during interrogation. In *Haley,* the Court observed:

> What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces.[15]

Later, in *Gallegos v. Colorado*, the Court reflected on immaturity, stating:

> The prosecution says that the youth and immaturity of the petitioner and the five-day detention are irrelevant, because the basic ingredients of the confession came tumbling out as soon as he was arrested. But if we took that position, it would, with all deference, be in callous disregard of this boy's constitutional rights. He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself.[16]

The Court has used adolescent development to restrict the freedom of children and youth as well, finding in *Schall v. Martin* that pre-adjudicatory detention is constitutional. The Court acknowledged that the state has a legitimate interest in "protecting the juvenile from his own folly"[17] and, in a footnote, acknowledged the following:

12 *Eddings*, 455 U.S. at 115-16 (1982) (discussing special considerations in every state for children and youth, particularly special juvenile delinquency procedures) (citing *In re Gault,* 387 U.S. 1, 14 (1967)).
13 *Eddings*, 455 U.S. at 116 (citing *Bellotti v. Baird,* 443 U.S. 622, 635 (1979)).
14 *Bellotti v. Baird,* 443 U.S. 622, 635 (1979).
15 *Haley v. Ohio,* 332 U.S. 596, 599-601 (1948).
16 *Gallegos v. Colorado,* 370 U.S. 49, 54-55 (1962).
17 *Schall v. Martin,* 467 U.S. 253, 265 (1984) (citing *People ex rel. Wayburn v. Schupf,* 39 N.Y.2d, 682, 688–689 (1976)).

> Our society recognizes that juveniles in general are in the earlier stages of their emotional growth, that their intellectual development is incomplete, that they have had only limited practical experience, and that their value systems have not yet been clearly identified or firmly adopted....[18]

Courts continually use developmental characteristics of children and youth in interpreting the laws that affect them. Juvenile defenders similarly must incorporate the developmental characteristics of children and youth into their representation to adequately protect a client's rights including the right to remain silent, the right to a fair trial and competency to stand trial.

18 *Id.*

One of the most exciting discoveries from recent neuroscience research is how incredibly plastic the human brain is. For a long time, we used to think that the brain, because it's already 95 percent of adult size by age six, things were largely set in place early in life.... [There was the] saying: "Give me your child, and by the age of five, I can make him a priest or a thief or a scholar." ◀ [There was] this notion that things were largely set at fairly early ages. And now we realize that isn't true; that even throughout childhood and even the teen years, there's enormous capacity for change. We think that this capacity for change is very empowering for teens....[19]

II. DEVELOPMENTAL CHARACTERISTICS OF CHILDREN AND YOUTH

Recent research on brain development and adolescent development suggests that children and youth have great potential for change into their late teen and early adult years. This exciting new information provides opportunities for defense advocacy that can impact the lives of young clients. Juvenile defenders can use scientifically identified developmental characteristics of children and youth to identify a client's strengths and mitigate behaviors at almost every stage of the delinquency process.

19 Interview with Dr. Jay Geidd, *Frontline: Inside the Teenage Brain,* PBS television broadcast (Jan. 31, 2002), *available at* www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/giedd.html. Geidd is a neuroscientist at the National Institute of Mental Health. Recently, he spearheaded research showing for the first time that there is a wave of growth and change in the adolescent brain.

Awareness of the following developmental characteristics will be helpful in identifying for the court the client's capacities and needs.

A. Age

Defenders should not rely on age alone to presume a client's capabilities. Age is an imprecise marker of the maturation process[20], because children and youth mature at different rates and unevenly,[21] resulting in behaviors that appear to be simultaneously developed, independent, emotionally childish and impulsive.[22] Information about a client's development is a better barometer of a client's capacities and may ultimately affect how the court perceives her culpability and amenability to treatment.[23]

B. Neurological Development

Many recent studies indicate that a child or youth's brain continues to develop during adolescence and is not completely developed until early adulthood.[24] During adolescence, there is exuberant growth in the brain followed by a particularly critical period of "brain sculpting."[25] The first growth spurt in the brain occurs when the fetus is in the womb; the second largest growth in the brain occurs during adolescence.[26] The area of the brain that controls planning, organizing information and thinking about the possible consequences of an action, as well as "affect regulation," or the ability to inhibit or delay impulsive and emotional reactions, is called the prefrontal cortex.[27] This area is one of the last areas of the brain to develop.[28] Similarly, the cerebellum, which coordinates the cognitive process or thinking process, does not develop until the early 20s.[29] Because it is the cerebellum that navigates the thinking process, children and youth in their teens can be "mentally clumsy" or lacking in social skills because they have not developed the ability to smooth out all the different intellectual processes needed to navigate their lives.[30]

Dr. Jay Geidd, a neuroscientist at the National Institute of Mental Health, describes brain growth and development during adolescence as follows:

> I think that [in the teen years, this] part of the brain that is helping organization, planning and strategizing is not done being built yet.... [It's]

20 Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process and Juvenile Justice Policy* at 20 (Oct. 2004), University of Virginia Legal Working Paper Series, University of Virginia Public Law and Legal Theory Working Paper Series, Working Paper 11, *available at* http://law.bepress.com/uvalwps/uva_publiclaw/art11.
21 *Id.* at 26.
22 Marty Beyer, *Recognizing the Child in the Delinquent, in* Kentucky Children's Rights Journal, Vol. VII, No. 1 (Spring 1999).
23 Laurence Steinberg & Laura H. Carnell, *Adolescent Development and Juvenile Justice Policy*, materials from T. Grisso & R. Schwartz, Competence, Culpability, and Youth: Toward a Coherent System of Juvenile Justice (University of Chicago Press, 2003).
24 Interview with Dr. Jay Geidd, *Inside the Teenage Brain*, *supra* note 20.
25 *Id.*
26 *Id.*
27 Scott & Grisso, *supra* note 21, at 21; Elizabeth R. Sowell, et. al., *In vivo evidence for post-adolescent brain maturation in frontal and striatal regions*, Nature Neuroscience, vol. 2. no. 10 (October 1999), *available at* www.nature.com/neuro/journal/v2/n10/pdf/nn1099_859.pdf.
28 Scott & Grisso, *supra* note 21, at 21; Sowell, et. al.
29 Interview with Dr. Jay Geidd, *Inside the Teenage Brain*, *supra* note 20.
30 *Id.*

> not that the teens are stupid or incapable of [things]. It's sort of unfair to expect them to have adult levels of organizational skills or decision making before their brain is finished being built....[31]

C. Cognitive/Intellectual Development: How Children and Youth Think

New research in neuroscience suggests that because the prefrontal cortex in children and youth is not fully developed, the brain does not use it. Adults are able to reason using their prefrontal cortex, but children and youth must rely on the part of the brain that responds emotionally—utilizing what is often called a "gut response."[32] The result is that children and youth exhibit an impulsive behavioral response instead of a thoughtful, measured response.[33] During adolescence, the child or youth's brain is not allowing her to think through the consequences of her behavior.[34]

Children and youth also think differently than adults[35] because they lack the experience of adults.[36] Without experience, children and youth are not able to engage in adult-like reasoning and are less mature than adults.[37] Their inability to reason makes them less future-oriented, less risk-averse, more impulsive and more susceptible to the influence of others.[38] A stressful or unstructured situation can further affect a child or youth's ability to reason.[39]

Immature cognitive/intellectual capacity may impede your client's ability to make decisions about her case. A recent study on Adolescent Development and Juvenile Justice by the MacArthur Research Network, entitled *The MacArthur Juvenile Adjudicative Competence Study,* evaluated the ability of children and youth to make decisions about their cases from encounters with police and attorneys to decisions about how to plead. Overall, the study found a significantly larger proportion of juveniles in the community who are 15 and younger, and an even larger proportion of juvenile offenders 15 and younger are probably not competent to stand trial in a criminal proceeding.[40] The risk for incompetence to stand trial is likely greater among adolescents who are involved in the justice system because there are a greater proportion of children and youth with below-average intelligence involved in the justice system. The MacArthur study found that individuals 15 and under, compared to adults, differed significantly in their legal decision-making. Children and youth

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31 *Id.*

32 Interview with Deborah Yurgelun-Todd, *Frontline: Inside the Teenage Brain,* PBS television broadcast (Jan. 31, 2002), *available at* www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/todd.html. Yurgelun-Todd is the director of neuropsychology and cognitive neuroimaging at McLean Hospital in Belmont, Mass. Her recent work suggests that teens' brains actually work differently than adults' when processing emotional information from external stimuli.

33 *Id.*

34 *Id.*

35 Beyer, *Recognizing the Child, supra* note 23, at 17.

36 Scott & Grisso, *supra* note 21, at 22.

37 *Id.*; Steinberg & Carnell, *supra* note 24.

38 Steinberg & Carnell, *supra* note 24.

39 Scott & Grisso, *supra* note 21, at 23.

40 *The MacArthur Juvenile Adjudicative Competence Study,* MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice (Nov. 22, 2005), *available at* www.mac-adoldev-juvjustice.org/competence%20study%20summary.pdf.

were less likely to recognize the risks inherent in different choices and less likely to think about the long-term consequences of their choices, such as choosing to confess versus remaining silent when being questioned by the police. For strategies on competency to stand trial, see *Chapter 10: Mental Incapacity to Proceed.*

An understanding of cognitive/intellectual development may aid in determining what your client was thinking (or not thinking) before, during or after the alleged offense. Adolescent decision-making is often guided by four general principles.

1. Minimizing Danger

Children and youth believe that they are invincible and often engage in unnecessary risks because they believe "it can't happen to me"[41], even when this conclusion is not supported by facts known to them.[42] Adolescent invincibility is a combination of normal egocentrism, wherein children and youth believe that no one has ever experienced similar feelings and emotions[43], and normal adolescent inability to manage impulses.[44] Children and youth tend to weigh anticipated gain more heavily than losses in making choices and as a result are greater risk takers.[45]

2. Inability to Anticipate Consequences

Immature cognitive development affects the client's ability to think ahead or imagine unwanted consequences. Youth and adults differ in their capacity for impulse control, or the ability to be influenced by reason rather than emotion, especially the ability to consider probable consequences.[46] Children and youth can be cognitively limited to a "present orientation"[47] and may be unable to think differently about a situation. An adolescent client may express surprise at a particular outcome, saying: "It happened so fast, I couldn't think." [48] Children and youth cannot predict unintended consequences the way adults do.[49] For example, a client may understand that using drugs can lead to an addiction or an overdose and that sex without contraception can lead to pregnancy, but may not have the ability to integrate that abstract knowledge into everyday life so as to utilize the knowledge in decision-making.[50]

3. Inability to Consider Multiple Choices

Defenders often wonder why a client made a particular decision during an alleged offense as opposed to another and ask, "Why didn't you just walk away?" or "Why didn't you tell an adult?" The response from the client is usually, "I don't know." Some children and youth may believe they have only one option to resolve a situa-

41 Huebner, *supra* note 2.
42 Beyer, *Recognizing the Child, supra* note 23, at 17.
43 *Id.*; Huebner, *supra* note 2.
44 Beyer, *Recognizing the Child, supra* note 23, at 17.
45 Scott & Grisso, *supra* note 21, at 24.
46 *Id.* at 23.
47 Beyer, *Recognizing the Child, supra* note 23, at 17.
48 *Id.*
49 *Id.*
50 Laurence Steinberg & Ann Levine, You and Your Adolescent: A Parent's Guide for Ages 10–20 (1997), at 147.

tion.[51] Sometimes a child or youth can generate alternative possibilities and weigh them in a rational decision-making process, but typically an inflexible "either/or" mentality prevails, especially under stress.[52] Often during adolescence, children and youth feel cornered and are incapable, because of immaturity, to see any way out except an action that shows poor judgment. It is not unusual, even for intelligent children and youth, to imagine only one scenario.

4. Reacting to Perceived Threat

Fear can often interfere with a child's ability to make choices. For children and youth who have felt threatened before, self-protection becomes an automatic reaction and is understandable even if, after the fact, an adult's assessment is that the actual danger facing the individual was minimal. Perceived threat can only be evaluated from the perspective of a person at the time she felt in danger.[53]

D. Physical Development

A client can be impacted by physical development through the changes it makes on her outward appearance and the ways in which others view her.[54] Children and youth grow rapidly between the ages of eight and 14. This growth rate increases the body's need for sleep and increases the appetite.[55] Girls tend to suffer from a lack of self-confidence, and boys are often suddenly expected to act more mature simply because they appear more adult-like in stature.[56] Children and youth can feel awkward and clumsy about their appearance and may begin to compare themselves to others.[57]

Children and youth whose physical appearance and normative intellectual, emotional or social development do not progress at the same time may be at a disadvantage in court, since their outward appearance may suggest a higher capacity for responsible decision-making than is warranted given their developmental stage.[58]

Defenders should consider physical development and the impact it has on the child or youth and how the outside world views her. For example, a client who is "acting out" in detention may simply be growing and need additional nutrition and sleep. Children and youth in detention may be craving privacy due to feelings of awkwardness about changes in their bodies. A boy who is large in stature may appear to the court to be more "responsible" than he really is. Children and youth may be taking risks to impress friends and to "fit in" because they are not physically developing at the same rate as their peers.

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51 Beyer, *Recognizing the Child*, *supra* note 23, at 17.
52 *Id.*
53 *Id.*
54 Steinberg & Carnell, *supra* note 24.
55 Rachael A. Ozretich & Sally R. Bowman, *Middle Childhood and Adolescent Development*, Oregon State University Extension Service (January 2001), *available at* http://extension.oregonstate.edu/catalog/pdf/ec/ec1527.pdf.
56 *Id.*
57 *Id.*
58 Steinberg & Carnell, *supra* note 24.

E. Identity/Independence

During early adolescence, children and youth begin the tumultuous process of separating from their families and establishing their own autonomy.[59] The transition is often not smooth and can be a very difficult time for a child, straining relations with family, peers and other adults in their lives.[60] Many children and youth vacillate between childlike dependency and an exaggerated expression of confidence and independence.[61]

Identifying with peers is an important aspect of self-definition. Children and youth need to be liked[62] and most are highly susceptible to peer pressure.[63] Group membership—including distinguishing dress, hairstyles and mannerisms—can provide the sense of belonging that is necessary for a young person to feel valued.[64] Children and youth do not think that hanging out with a bad crowd will make them bad.

F. Morals

Children develop their own sense of morality during adolescence.[65] Adolescents are often quick to point out inconsistencies between adults' words and their actions.[66] Ironically, because children and youth often mature at different rates of cognitive development, they may advocate for specific values and violate them at the same time.[67] Morality is also often motivated by a desire to please someone.[68] Initially, children are motivated to please their parents; however, as they get older, they may become more worried about pleasing their peers.[69] Moral decisions change over time, becoming based on what will make a child or youth popular.[70]

A client may express her moral development in the following ways:

1. Focus on Fairness

Children and youth are "fairness fanatics" in the area of moral development and may not be able to get beyond a result they view as unfair.[71] A client may assert she "did not do it," even though legally, she may be an accessory to the alleged offense, in constructive possession of a handgun or illegal substance, or culpable in the theft of a motor vehicle, even though she was not the driver. Her preoccupation with believing

59 Scott & Grisso, *supra* note 21, at 26; Steinberg & Carnell, *supra* note 24 (adolescents develop autonomy and independence between the ages of 12 and 17); Ozretich & Bowman, *supra* note 56.
60 Steinberg & Carnell, *supra* note 24.
61 *Id.*
62 Marty Beyer, *Adolescents Are Often Too Immature to Assist in Their Own Defense*, materials presented at NLADA conference in Seattle, Washington (June 19, 1999).
63 Steinberg & Carnell, *supra* note 24.
64 Beyer, *Recognizing the Child, supra* note 23, at 19.
65 Steinberg & Levine, You and Your Adolescent, *supra* note 51, at 151.
66 Huebner, *supra* note 2.
67 Ozretich & Bowman, *supra* note 56.
68 Steinberg & Levine, You and Your Adolescent, *supra* note 51, at 152.
69 *Id.*
70 *Id.*
71 Beyer, *Adolescents Are Often Too Immature, supra* note 63.

that she is being unfairly accused may prohibit her from thinking more rationally about the pending charges.

Fairness also plays an important role in the client's relationships with adults. If a client believes through experience with other adults, such as teachers and police officers, that she will not be treated fairly, she is likely to believe that she will not be treated fairly by a court-appointed lawyer. This can be a difficult barrier for a juvenile defender to work through and requires patience and understanding.

2. Perceived Lack of Remorse

Remorse is often one of the most difficult issues to address when representing young clients. Children and youth often act "tough" and show little to no expression when talking about an alleged offense. The growth of empathy is part of moral development in children and youth and is a crucial component of evaluating a delinquent's remorse about an offense.[72] It is critical that juvenile defenders explore a client's true feelings about an offense, so that misperceptions in court do not arise, especially on the issue of remorse. The court may perceive that the client shows no remorse for an offense because she refuses to "take responsibility" for causing the harm.[73] A client who stabs someone in self-defense may be fixated on the self-defense aspect of the offense and not on the fact that she stabbed someone. A client really may be wishing the offense never happened when she says, "It was an accident."[74] The more emotionally immature the client, the more difficult it is for her to ultimately confront the shame of having committed the offense.[75]

3. Loyalty

Moral development also includes a youth's code of loyalty, often to her peers.[76] For example, if a client believes it is morally wrong to snitch, she may never tell her lawyer or be willing to proclaim her innocence if it means testifying in court against a friend.[77] This moral code makes it difficult for lawyers representing young clients to establish whether or not the client has the capacity to make a decision about a plea or going to trial.

72 Beyer, *Recognizing the Child, supra* note 23, at 19.
73 *Id.*
74 *Id.*
75 *Id.*
76 Beyer, *Adolescents Are Often Too Immature, supra* note 63.
77 *Id.*

G. Unresolved Trauma

Delinquent activity is often related to physical and sexual abuse, exposure to domestic violence and losses that interfere with cognitive, moral and identity development. Aggression can be a defense mechanism against the helpless feelings common among traumatized children. Often, traumatized children present a passive account of having no choice but to defend themselves when they feel threatened.[78]

In addition, aggressive children and youth tend to misconstrue and take offense at what others say and do. Aggressive children may have had difficulty since childhood expressing their feelings verbally, rather than behaviorally.[79] The aggression exhibited by victimized children and youth is often misinterpreted as offensive, rather than defensive.[80]

To effectively advocate on behalf of children and youth, it is vitally important that lawyers representing them understand that they are experiencing physical, intellectual, emotional and social development as a natural part of maturation. It is equally important that this explosion in development be presented to courts to accurately portray the individuality of each client, as well as the typicality of her nature.

78 Beyer, *Recognizing the Child, supra* note 23, at 20.
79 *Id.*
80 *Id.*

CHAPTER 4

A SUMMARY OF THE LOUISIANA JUVENILE COURT PROCESS

A study of adolescent development informs us that children and youth experience time differently than adults. A child or youth must understand the delinquency process and any conditions that may be imposed on her as a result of her involvement in a delinquent offense. However, for children, the connection between a sanction and a wrongdoing fades as the time between the two increases.[1] The Louisiana Children's Code acknowledges that children and youth perceive time differently and provides for separate, expedited procedures for juvenile delinquency cases.

The purpose of this chapter is to provide a concise overview of all stages of the delinquency process in Louisiana—from entry into the delinquency system through appeal and expungement of records. Under the Louisiana Children's Code, a child accused of a delinquent act is entitled to counsel at "every stage of proceedings."[2] A child's right to counsel is much more extensive than an adult's in criminal court, and it is crucial that attorneys representing children in delinquency proceedings be familiar with procedure at every stage so that effective representation can be provided.

I. ENTRY INTO THE JUVENILE JUSTICE SYSTEM: ARREST AND CUSTODY

A child may enter the delinquency system through an arrest,[3] court order[4] or through service of a petition and summons to appear before the court.[5]

A. Arrest

Under the Louisiana Children's Code, the taking of a child into custody is not an arrest.[6] However, a child may be taken into custody pursuant to the laws governing arrest generally, and such will be considered an arrest for purposes of determining the validity of the custody under the Constitution of the United States.[7]

1 D. Alan Henry, *Reducing Unnecessary Delay*: *Innovations in Case Processing* 12–13 (1999), *in* Annie E. Casey Foundation, Juvenile Detention Alternatives Initiative, Pathways to Juvenile Detention Reform, *available at* www.aecf.org/initiatives/jdai/pdf/5_reducing.pdf.
2 La. Child. Code Ann. art. 809(A) (2006).
3 La. Child. Code Ann. art. 812(A) (2006); La. Child. Code Ann. art. 814 (2006).
4 La. Child. Code Ann. art. 812 (2006); La. Child. Code Ann. art. 813 (2006); *State v. Erven* (2002) 36332 (La. App. 2 Cir. 10/23/02); 830 So.2d 368, 376.
5 La. Child. Code Ann. art. 847 (2006).
6 La. Child. Code Ann. art. 812(B) (2006).
7 *Id.*

For a lawful arrest, a peace officer or probation officer must have probable cause to believe that the child committed a delinquent act or violated a condition of her probation or condition of her release or parole.[8] If a child is taken into custody as a result of arrest and without a court order or warrant, the arresting officer has two options: 1) counsel the child and release her to the care of her parents, or 2) promptly escort her to an appropriate facility in accordance with Louisiana Children's Code Article 815.[9]

After the child's arrest, the officer shall *immediately* execute a written affidavit and submit it to the juvenile court.[10] The affidavit must provide facts to support probable cause to believe either that the child committed a delinquent act or that the child has violated the terms of her probation or the terms of her release, or parole.[11]

Process if child held in custody:

- If the child is not released into the care of her parents or guardian, the officer shall *promptly* notify her parents that she has been taken into custody.[12]
- The officer must then submit a report to the district attorney or court officer designated to receive such reports within *24 hours* after the child has been taken into custody.[13]
- Within *48 hours* of the child's arrest, the juvenile court must review the affidavit submitted to the court to determine whether there was indeed probable cause for the arrest of the child.[14]
- If the court determines that there was probable cause for the arrest, a continued custody hearing shall be scheduled within *3 days* of the child's entry into the juvenile detention center or shelter care facility.[15]
- If the court determines that there was not probable cause for the arrest, the child shall be released.[16]

Process if child released to parents:

8 La. Child. Code Ann. art. 814 (2006); *see Lazard v. Foti,* 02-2888 (La. 10/21/03); 859 So.2d 656, 664 (Johnson, J., dissenting).
9 La. Child. Code Ann. art. 814(B) (2006). Article 815 of the Children's Code provides that a child taken into custody for the commission of a felony-grade delinquent act or a misdemeanor-grade delinquent act upon the person of another shall be taken to a juvenile detention center and that a child taken into custody for any other misdemeanor-grade delinquent act shall be taken to either a shelter-care facility or a juvenile detention center. La. Child. Code Ann. art. 815 (2006).
10 La. Child. Code Ann. art. 814(D) (2006); *Lazard*, 859 So.2d at 664.
11 La. Child. Code Ann. art. 814(D) (2006).
12 La. Child. Code Ann. art. 814(C) (2006).
13 La. Child. Code Ann. art. 814(F) (2006).
14 La. Child. Code Ann. art. 814(D) (2006).
15 La. Child. Code Ann. art. 819 (2006).
16 La. Child. Code Ann. art. 814(D) (2006).

- If the child is released to her parents or guardian following arrest, the officer shall submit a report to the district attorney or court officer designated to receive such reports within *7 days* from the child's release.[17]

B. Custody Pursuant to Court Order

A child may also be taken into custody pursuant to a court order. The court may order that a child be taken into custody when presented with an affidavit[18] alleging facts that show there is probable cause to believe the child committed a delinquent act or violated a condition of her probation or conditions of her release from custody.[19] The affidavit may be presented by "a peace officer, probation officer, district attorney, or other person designated by the court."[20]

The court order directing that the child be taken into custody may be executed by a peace officer or the child's probation officer.[21] The officer taking the child into custody shall *promptly* notify the child's parents that she has been taken into custody.[22] The officer shall also *promptly* take the child to the appropriate facility in accordance with Article 815 of the Children's Code.[23]

As soon as practicable after a child is received by the juvenile detention center or shelter care facility, the court or juvenile probation officer with authority from the court, shall, when determined appropriate, release the child to the care of her parents or other relative upon a promise that the child will be brought to court at times fixed by the court.[24]

If the child is continued in custody, the court shall hold a continued custody hearing within *3 days* after the child's entry into the juvenile detention center or shelter care facility.[25]

17 *Id.*
18 La. Child. Code Ann. art. 812(A) (2006).
19 La. Child. Code Ann. art. 813 (2006); *State v. Erven*, 830 So.2d at 376.
20 *Id.*
21 La. Child. Code Ann. art. 813(C) (2006); *Erven,* 830 So.2d at 376.
22 *Id.*; *see* La. Child. Code Ann. art. 817(A) (2006).
23 *Id.*
24 La. Child. Code Ann. art. 817 (2006).
25 La. Child. Code Ann. art. 819 (2006); *see also Lazard,* 859 So.2d at 664; *State v. Dawson,* 00-2279 (La. 11/27/00); 775 So.2d 1046, 1048 (Calogero, C.J., dissenting from denial of writ application); *State v. Hamilton,* 96-0107 (La. 07/02/96); 676 So.2d 1081, 1081; *Markley v. Town of Elton*, 2002-0528 (La. App. 3d Cir. 10/30/02); 829 So.2d 1213, 1214; *In re Jackson,* 99-2977 (La. App. 4th Cir. 03/22/00); 757 So.2d 900, 902; *In re M.L.W.,* 97-1617 (La. App. 3d Cir. 04/01/98); 709 So.2d 364, 365.

II. PRE-ADJUDICATION PROCEDURES

A. Petition

A delinquency proceeding shall be commenced with the filing of a petition.[26] A petition is a document alleging that the child committed a delinquent act.[27] The district attorney may file a petition without leave of court; however, with leave of court, any person authorized by the court may file a petition if there are reasonable grounds to believe that the child is a delinquent child.[28] A copy of the petition and a summons to appear to answer the petition shall be served on the child and her parents.[29]

> Time Limitation for Filing of Petition: If a child is detained prior to adjudication, the delinquency petition shall be filed within *48 hours* of the continued custody hearing.[30] If the petition is not filed timely, the child shall be released from custody.[31]

B. Answer

A child must appear before the court to answer the allegations in the petition. This is often the first court appearance for a child who has not been continued in custody. At the hearing, the court must determine whether the child is capable of understanding the proceedings and advise the child of her constitutional rights—including the right to counsel—as well as apprise her of the consequences of any admission she may make at the hearing.[32] The child may answer the petition by denying the allegations in the petition, denying the allegations and pleading insanity, admitting to the allegations, or entering a response of *nolo contendere* with permission of the court.[33]

> Deadline for Answer When Child in Custody: If the petition is filed prior to or during the continued custody hearing, the court may order the child to answer the petition at the continued custody hearing.[34] If the child is not ordered to answer the petition at the continued custody hearing, she must appear to answer within *5 days* after the petition is filed.[35]

26 La. Child. Code Ann. art. 842 (2006).
27 *See Erven*, 830 So.2d at 374; *State v. Robinson*, 33, 720A (La. App. 2d Cir. 06/21/00); 764 So.2d 190, 194; *In re A.H.*, 95-1094 (La. App. 3d Cir. 01/31/96); 670 So.2d 361, 368.
28 La. Child. Code Ann. art. 842 (2006); *see also Erven,* 830 So.2d at 374; *Robinson*, 764 So.2d at 194; *In re A.H.*, 670 So.2d at 368.
29 La. Child. Code Ann. art. 847 (2006); La. Child. Code Ann. art. 850(A) (2006).
30 La. Child. Code Ann. art. 843(A) (2006); *see Hamilton,* 676 So.2d at 1084; *Erven,* 830 So.2d at 370.
31 La. Child. Code Ann. art. 843(B) (2006).
32 La. Child. Code Ann. art. 855 (2006); *see, e.g., Erven,* 830 So.2d at 374; *In re Q.U.O.*, 39, 303 (La. App. 2d Cir. 10/27/04); 886 So.2d 1188, 1190; *In re K.G.*, 34, 535 (La. App. 2d Cir. 01/24/01); 778 So.2d 716, 728; *In re D.S.*, 95-1019 (La. App. 5th Cir. 04/16/96); 673 So.2d 1123, 1127; *In re J.G.*, 94-CA-194 (La. App. 5th Cir. 07/26/94); 641 So.2d 633, 639.
33 La. Child. Code Ann. art. 856(A) (2006).
34 La. Child. Code Ann. art. 854(A) (2006); *see Erven,* 830 So.2d at 374; *State v. B.J.D.*, 35, 409 (La. App. 2d Cir. 09/26/01); 799 So.2d 563, 565; *In re Franklin*, 95-0423 (La. App. 4th Cir. 07/26/95); 659 So.2d 537, 537.
35 *Id*.

Deadline for Answer When Child Not in Custody: A child not in custody must appear to answer the petition within *15 days* after the filing of the petition.[36] The court may extend the period for good cause.[37]

1. Insanity Plea

When a child pleads insanity, "the court shall appoint counsel...and may appoint a sanity commission pursuant to Article 834 of the Children's Code to make an examination as to the child's mental condition at the time of the offense."[38] "The court may also order the commission to make an examination as to the child's present mental capacity to proceed."[39]

If the court determines that the child was insane at the time of the offense, the court may: 1) Place the child in the custody of his parents or other suitable person; 2) Place the child on probation in the custody of his parents or other suitable person; or 3) Commit the child to the Department of Health and Hospitals, office of mental health or a private institution or institution for the mentally ill pursuant to Article 895.[40]

C. Transfer

Under certain circumstances, a child's case may be transferred by the juvenile court to criminal court for prosecution. When a child is 14 years old at the time of the alleged offense and the petition alleges first-degree murder, second-degree murder, aggravated kidnapping, aggravated rape, aggravated battery when committed by the discharge of a firearm, armed robbery with a firearm, or forcible rape, if the rape is committed upon a child at least two years younger than the alleged rapist, the juvenile court may consider transferring its jurisdiction over the case to the criminal court.[41] Under such circumstances, the district attorney or the child may request a transfer hearing[42] or the court may set a transfer hearing upon its own motion.[43]

Time Limitations and Notice: A motion for a transfer hearing may be filed *any time* after the delinquency petition has been filed.[44] Notice in writing of the time, place, and purpose of the hearing must be given to the child and her parents at least *10 days* before the hearing.[45] The transfer hearing

36 La. Child. Code Ann. art. 854(B) (2006).
37 La. Child. Code Ann. art. 854(C) (2006).
38 La. Child. Code Ann. art. 869(A) (2006). Article 834 of the Children's Code sets forth the qualifications and procedures for the sanity commission. La. Child. Code Ann. art. 834 (2006).
39 *Id.*
40 La. Child. Code Ann. art. 894 (2006). Article 895 of the Children's Code provides that the court may only commit a child to a public or private institution if the court finds, based on psychological or psychiatric evaluation, that the child has a mental disorder, other than mental retardation, which has a substantial adverse effect on his ability to function and requires care and treatment in an institution. La. Child. Code Ann. art. 895 (West 2006).
41 La. Child. Code Ann. art. 857 (2006); *see, e.g., State v. D.J.,* 2001-2149 (La. 05/14/02); 817 So. 2d 26, 33; *In re Olivieri v. State,* 00-0172 (La. 02/21/01) 779 So. 2d 735, 739; *State v. Fernandez,* 96-2719 (La. 04/14/98); 712 So. 2d 485, 486; *State v. Dixon,* 98-0090 (La. App. 4th Cir. 06/03/98); 712 So. 2d 1078, 1079–1780; *State v. Comeaux*, 93-2729 (La. 07/02/97); 699 So. 2d 16, 20; *State v. Jackson*, 608 So. 2d 949, 956 (La. 1992).
42 La. Child. Code Ann. art. 858(A) (2006); *see Dixon,* 712 So. 2d at 1080; *Erven,* 830 So.2d at 373; *Davis,* 749 So.2d at 703.
43 La. Child. Code Ann. art. 858(A) (2006).
44 La. Child. Code Ann. art. 858(A) (2006).
45 La. Child. Code Ann. art. 858(B) (2006).

must be heard prior to the adjudication hearing or acceptance of an admission to the delinquency petition.[46]

The child and the state have the right to file for a discretionary review of the court's decision regarding transfer of jurisdiction.[47] The court's transfer decision is an interlocutory judgment and may be reviewed summarily by the appropriate court of appeal.[48]

D. Waiver to Criminal Court Jurisdiction

There are two procedures by which the juvenile court is automatically divested of its exclusive original jurisdiction: legislative[49] and prosecutorial waiver.[50] Each type of waiver involves specific classes of children and the allegation of specific criminal offenses. "Waiver" of jurisdiction differs from "transfer" of jurisdiction in that transfer requires the juvenile court to make its own determination about whether to retain the matter under its exclusive original jurisdiction or move the case to a court of criminal jurisdiction. The juvenile court does not have authority to determine jurisdiction in cases involving legislative or prosecutorial waiver. For more information on transfer and waiver, *see Chapter 14: Transfer*.

E. Pre-Adjudication Motions for Relief

Counsel must file any pre-adjudication motions and other requests for pre-adjudication relief within *15 days* after the child has appeared to answer the petition.[51] The court may allow additional time for the filing of such motions in the interests of justice and may permit such requests to be made by oral motion.[52]

1. Discovery

A juvenile client is entitled to the same discovery as any adult facing criminal charges,[53] including: statements by the child, the child's prior criminal record, documents and tangible objects, reports of examinations and tests, evidence of other crimes, statements of coconspirators, confessions and inculpatory statements of co-defendants.[54] A motion for discovery must be filed within the time frame for pre-adjudication motions.[55]

46 La. Child. Code Ann. art. 858(A) (2006).
47 La. Child. Code Ann. art. 863(B) (2006); *see State v. Collins,* 29, 368 (La. App. 2d Cir. 05/07/97); 694 So.2d 624, 625.
48 *Id.*
49 La. Child. Code Ann. art. 305(A) (2006). Article 305(A) of the Children's Code involves "legislative waiver" because legislative fiat has automatically waived juvenile court jurisdiction when an indictment is obtained or when the court finds probable cause that the accused committed the offense.
50 La. Child. Code Ann. art. 305(B) (2006). Article 305(B) of the Children's Code is referred to as "prosecutorial waiver" because the prosecutor's charging decision determines in which forum the case will be heard.
51 La. Child. Code Ann. art. 865(A) (2006).
52 *Id.*
53 Discovery shall be as provided in the Louisiana Code of Criminal Procedure. La. Child. Code Ann. art. 866 (2006): *See, e.g., State v. J.B.*, 94-213 (La. App. 3d Cir. 10/05/94) 643 So.2d 402, 404.
54 La. Code Crim. Proc. arts. 716-723 (2006).
55 La. Code Crim. Proc. art. 729 (2006), *see* La. Code Crim. Proc. art. 521 (2006).

2. Bills of Particulars

The court may require the district attorney to furnish a bill of particulars on motion of the child or on the court's own motion.[56] A bill of particulars specifies in detail the nature and cause of the allegations charging that the child committed a delinquent act.[57] A bill of particulars must be filed with the clerk of court, and a copy must be given to the child or his counsel.[58] Supplemental bills of particulars may be ordered by the court at any time before the adjudication hearing.[59]

If the bill of particulars does not cure the defects in the petition, then the district attorney may file another bill of particulars.[60] The supplemental bill of particulars must be filed within a period fixed by the court, not to exceed *3 days* from the order.[61] If the district attorney cannot furnish a sufficient bill of particulars when ordered to do so by the court, the court *may dismiss* the petition.[62]

3. Medical, Sensory, Psychological and Psychiatric Examinations

The court may order any child appearing before it to be examined by a physician, optometrist or audiologist on a motion by the child, district attorney, or the court.[63] The court may also order that the child be examined by a psychologist or psychiatrist on motion of the child.[64] Copies of any reports of findings submitted to the court shall be available to counsel for all parties.[65] The examination must be made and the findings submitted to the court within *30 days* of the date the order is entered. The court may extend the time for good cause.[66]

F. Diversion

A child entering the juvenile court system may be diverted from the formal juvenile delinquency process through an *informal adjustment agreement*. An informal adjustment agreement is an agreement between the child, the prosecutor and the court that the child's case will be suspended for a specified period of time in exchange for the child's agreement to complete certain conditions under supervision[67], such as community service or participation in youth court or drug court programs.

The court, with the consent of the district attorney, may authorize the district attorney or probation officer to effect an informal adjustment agreement if the child and

56 La. Child. Code Ann. art. 870(A) (2006); *see, e.g., In re Nunez,* 94-2636 (La. App. 4th Cir. 06/07/95); 657 So. 2d 506, 509.
57 La. Child. Code Ann. art. 870(A) (2006)
58 La. Child. Code Ann. art. 870(B) (2006).
59 La. Child. Code Ann. art. 870(C) (2006).
60 La. Child. Code Ann. art. 871(B) (2006).
61 *Id.*
62 La. Child. Code Ann. art. 871(C) (2006).
63 La. Child. Code Ann. art. 867(A) (2006).
64 La. Child. Code Ann. art. 867(B) (2006).
65 La. Child. Code Ann. art. 867(D) (2006).
66 La. Child. Code Ann. art. 867(C) (2006).
67 La. Child. Code Ann. art. 841(B) (2006). Incriminating statements made by the child during the agreement process cannot be used in a later adjudication hearing or criminal trial. La. Child. Code Ann. art 841(C) (2006); *see also In re L.A.,* 95-409 (La. App. 5th Cir. 12/13/95), 666 So.2d 1142, 1146.

district attorney have no objection.[68] The agreement does *not* result in a finding of delinquency. If any of the terms of the agreement are violated, the case resumes and the delinquency process is followed.[69] If the child satisfies the terms of the agreement, she must be discharged from further supervision and the court shall dismiss the pending complaint or petition with prejudice.[70]

An informal adjustment agreement must be entered into *prior to the filing of a petition*[71] or *after the filing of a petition*[72]*, but before the attachment of jeopardy*.[73] "The period of informal adjustment may not exceed six months; however, the court may extend the agreement for one additional period not to exceed six months."[74]

G. Competency to Proceed

Under the Constitution of the United States, a person who lacks the capacity or competence to understand the procedures against them or to consult with his lawyer with a reasonable degree of rational understanding cannot be tried for a criminal offense.[75] Under the Louisiana Children's Code, mental incapacity means that "as a result of mental illness or developmental disability, a child presently lacks the capacity to understand the nature of the proceedings against him or to assist in his defense."[76]

A question regarding a child's mental incapacity or competency to proceed may be raised at *any time* by the child, the district attorney or the court.[77] "Once raised, there can be *no further steps* in the delinquency proceeding—except for the filing of a petition—until counsel is appointed and...notified and the child is found to have the necessary mental capacity to proceed."[78]

When competence is raised, the court shall order a mental examination to determine whether the child has the capacity to proceed and shall appoint a sanity commission to conduct the examination.[79]

68 La. Child. Code Ann. art. 839(B) (2006); *see generally In re A.M.*, 2002-154 (La. App. 5th Cir. 05/15/02); 821 So.2d 116, 117; *In re K.D.,* 98 1175 (La. App. 1st Cir. 04/01/99); 730 So.2d 1077, 1078.
69 La. Child. Code Ann. art. 841(B) (2006); *see* La. Child. Code Ann. art 841(C) (2005); *In re L.A.*, 666 So.2d at 1146.
70 *Id.*
71 La. Child. Code Ann. art. 839(A) (2006); s*ee generally In re A.M.,* 821 So.2d at 117; *In re K.D.,* 730 So.2d at 1078.
72 La. Child. Code Ann. art. 839(B) (2006). Article 840(D) of the Children's Code provides that an informal adjustment agreement must be filed in the record if authorized after a petition is filed. La. Child. Code Ann. art. 840(D) (2006); *see generally In re A.M.,* 821 So.2d at 117; *In re K.D.,* 730 So.2d at 1078.
73 La. Child. Code Ann. art. 839(B) (2006); Article 811 of the Children's Code states: "When a child enters a denial to the petition, jeopardy begins when the first witness is sworn at the adjudication hearing. When he enters an admission to the petition, jeopardy begins when a valid disposition is made the judgment of the court." La. Child. Code Ann. art. 811 (2006). *See, e.g., State v. R.W.,* 98-366 (La. App. 5th Cir. 10/14/98); 721 So.2d 943, 946.
74 La. Child. Code Ann. art. 840(C) (2006).
75 *Dusky v. U.S.*, 362 U.S. 402 (1960) *(per curiam).*
76 La. Child. Code Ann. art. 804(7) (2006).
77 La. Child. Code Ann. art. 832 (2006).
78 *Id.*
79 La. Child. Code Ann. art. 833(A) (2006); La. Child. Code Ann. art. 834(A) (2006).

Timeline:

- Within *7 days* of its order for a mental examination the court shall appoint a sanity commission.[80]
- The sanity commission shall file its report with the court and mail it to counsel for the child within *30 days* of the order of appointment. The court may extend the time for filing the report.[81]

A determination of the child's mental capacity to proceed shall be determined by the court in a contradictory hearing.[82] "If the court determines that the child has the mental capacity to proceed, the delinquency proceedings shall be resumed."[83]

If the court determines that the child lacks the mental capacity to proceed, the proceedings shall be suspended and the court can take one of the following actions: Dismiss the petition for good cause; adjudicate the child's family to be in need of services and proceed to a disposition; or commit the child to the Department of Health and Hospitals, a private mental institution or an institution for the mentally ill in accordance with Department of Health and Hospital policy, if the court finds the child is dangerous to himself or others.[84] The court may also order competency restoration services for the child.[85] If the sanity commission finds the child incapacitated and determines that the child will not attain the capacity to proceed in the future, then the court shall hold a hearing to determine if the child will, in the foreseeable future, be incapable of standing adjudication.[86] See *Chapter 10: Mental Incapacity to Proceed* for more detailed information on procedures when competency is raised in a delinquency case.

III. ADJUDICATION

The adjudication stage in a delinquency case is comparable to a trial in criminal court. At an adjudication hearing, the juvenile court judge,[87] after considering all evidence presented by the assistant district attorney and counsel for the child,[88] determines whether or not the child committed the delinquent act alleged beyond a reasonable doubt.[89]

80 La. Child. Code Ann. art. 834(A) (2006).
81 La. Child. Code Ann. art. 835(A) (2006).
82 La. Child. Code Ann. art. 836(A) (2006)
83 La. Child. Code Ann. art. 837(A) (2006).
84 La. Child. Code Ann. art. 837(B) (2006).
85 *Id.*
86 La. Child. Code Ann. art. 837 (2006).
87 La. Child. Code Ann. art. 882 (2006).
88 La. Child. Code Ann. art. 878 (2006). La. Child. Code Ann. art. 884 (2006). *See In re T.E.,* 2000-1810 (La. App. 4th Cir. 04/11/01); 787 So.2d 414, 418.
89 La. Child. Code Ann. art. 883 (2006); *see, e.g., In re D.J.,* 2001-2149 (La. 05/14/02); 817 So.2d 26, 29; *State v. J.M.,* 96-801 (La. App. 5th Cir. 01/15/97); 687 So.2d 136, 138.

Time Limitation for Adjudication When Child in Custody: If the child is continued in custody, the adjudication hearing shall commence within *30 days* of the child's appearance to answer the petition.[90] This time limitation may be extended for good cause.[91]

Time Limitation for Adjudication When Child Not in Custody: If the child is not being held in custody, the adjudication hearing shall commence within *90 days* of her appearance to answer the petition.[92] This time limitation may be extended for good cause.[93]

Following the adjudication hearing, the court shall *immediately* declare whether the evidence warrants a determination that the child is delinquent.[94] In exceptional circumstances, the court may take the matter under advisement.[95]

IV. POST-ADJUDICATION

A. Post-Adjudication Motions for Relief

1. Motion to Vacate Adjudication

After the court makes a determination of delinquency, counsel for the child may file a motion to vacate the adjudication based on several grounds, including: 1) the petition is substantially defective; 2) the delinquent act charged in the petition is not based upon an offense punishable under a valid statute; 3) the court lacked jurisdiction; 4) the act charged constitutes double jeopardy or 5) the prosecution was not timely instituted.[96] The motion to vacate must be filed prior to the disposition.[97]

90 La. Child. Code Ann. art. 877(A) (2006); *see In re J.G.,* 2003 0587 (La. App. 4th Cir. 12/10/03); 863 So.2d 669, 670; *In re R.D.C.,* 93-CK-1865 (La. 02/28/94); 632 So.2d 745, 747; *Erven,* 830 So.2d at 374.

91 La. Child. Code Ann. art. 877(D) (2006); *see In re R.D.C.,* 632 So.2d at 747.

92 La. Child. Code Ann. art. 877(B) (2006); *see, e.g., In re R.D.C.,* 632 So.2d at 747(Time limitations are mandatory and may only be extended for good cause. In making a determination of "good cause" the court must be mindful of *causes beyond the control of the state* which may impede its ability to prepare for the hearing.)*; Q.U.O.,* 886 So.2d at 1191; *In re J.B.,* 2003-0587 (La. App. 4 Cir. 12/10/03); 863 So.2d 669, 670.

93 La. Child. Code Ann. art. 877(D) (2006); *see R.D.C.,* 632 So.2d at 747.

94 La. Child. Code Ann. art. 884(A) (2006); *see In re S.D.,* 01-670 (La. App. 5th Cir. 01/29/02); 807 So.2d 1138, 1148 (Daley, J., concurring); *State v. W.T.B.,* 34, 269 (La. App. 2d Cir. 10/20/00); 771 So.2d 807, 809; *State v. J.C.G.,* 97-1044 (La. App. 3d Cir. 02/04/98); 706 So.2d 1081, 1082.

95 *Id.*

96 La. Child. Code Ann. art. 887(A) (2006); *see, generally, B.J.D.,* 799 So.2d at 567; *State v. R.W.,* 98-366 (La. App. 5th Cir. 10/14/98); 721 So.2d 943, 947.

97 *Id.*

2. Motion for a New Trial

"After [the] judgment is signed, a party may make a written request for a new trial on any ground provided by law."[98] A motion for a new trial must be filed within *3 days,* exclusive of holidays, from the mailing of notice of judgment.[99] A motion for a new trial shall be decided expeditiously by the court, within *7 days* from the date of submission for decision.[100]

B. Disposition

After the court adjudicates a child delinquent, it must hold a disposition hearing[101] to determine whether or not the child is in need of treatment or rehabilitation.[102] This stage of the delinquency proceedings is comparable to the sentencing phase in criminal court.

1. Deferred Dispositional Agreement

At any time after the adjudication and before a disposition is determined by the court, the district attorney or counsel for the child may request a deferred dispositional agreement. Under such an agreement, the court suspends the disposition hearing and places the child on supervised or unsupervised probation, with or without conditions such as a drug court program.[103] The child and his parent must consent to this type of dispositional agreement.[104]

A deferred dispositional agreement can remain in force for *6 months,* unless the child is discharged sooner by the court.[105] The court may also extend the agreement for another *6 months*, or for such period in which the child is a full-time participant in a juvenile drug court program, whichever period is longer.[106] The district attorney or probation officer must apply for an extension *before the initial 6-month period expires*.[107]

2. Predisposition Reports and Evaluations

In preparation for a disposition hearing, the court may order a predisposition report or predisposition investigation ("PDI"). If ordered, a probation officer investigates the child's home, educational, medical and social history, as well as the circumstances related to the commission of the delinquent act.[108] The probation officer

98 La. Child. Code Ann. art 332(C) (2006).
99 *Id.*
100 *Id.*
101 La. Child. Code Ann. art. 892 (2006); *see also In re J.C.O.,* 38, 661 (La. App. 2d Cir. 06/02/04); 877 So.2d 1020, 1025; *In re M.N.H.,* 01-1218 (La. App. 3d Cir. 02/06/02); 807 So.2d 1149, 1155; *State v. J.W.,* 01-135 (La. App. 5th Cir. 06/27/01); 791 So.2d 160, 162.
102 La. Child. Code Ann. art. 893(A) (2005); s*ee In re M.W.,* 34, 861 (La. App. 2d Cir. 02/07/01); 777 So.2d 1290, 1290; *In re O.R.,* 96-890 (La. App. 5th Cir. 02/25/97); 690 So.2d 200, 200; *In re R.L.K.,* 95-1277 (La. App. 1st Cir. 12/19/95); 666 So.2d 427, 432.
103 La. Child. Code Ann. art. 896(A) (2006).
104 La. Child. Code Ann. art. 896(B) (2006).
105 La. Child. Code Ann. art. 896(D) (2006).
106 *Id.*
107 *Id.*
108 La. Child. Code Ann. art. 890 (2006); *see In re R.L.K.,* 666 So.2d at 432.

then prepares a report for the court which generally includes a recommended disposition.[109] Copies of the predisposition report shall be made available to the district attorney and counsel for the child *at least 3 days in advance* of any scheduled disposition hearing.[110] Such period may be extended for good cause.[111]

In addition to the predisposition report, the court may order any physical and mental examinations and evaluations that may be helpful in determining a fair and just disposition.[112] Copies of any reports of findings submitted to the court shall be made available to the district attorney and counsel for the child.[113]

3. Disposition Hearing

At a disposition hearing, counsel for the state and the child may present evidence and cross-examine witnesses to assist the court in determining whether or not the child is in need of treatment or rehabilitation.[114]

The disposition hearing *may* be conducted immediately after the adjudication but *shall* be conducted within *30 days* after adjudication. This time limitation may be extended for good cause.[115] If, after the disposition hearing, the court finds the child is in need of treatment or rehabilitation, the court shall proceed immediately to make any appropriate disposition authorized by the Children's Code.[116] The court should impose the least restrictive disposition authorized by the Children's Code in accordance with the circumstances of the case, the needs of the child and the best interests of society.[117]

4. Disclosure of Predisposition Report to Other Agencies

In certain cases in which the youth is arrested, charged or adjudicated delinquent for committing a felony-grade delinquent act or a misdemeanor-grade delinquent act involving distribution or possession with intent to distribute a controlled dangerous substance, the court must order the release of any portion of a predisposition report relating to the instant arrest, conviction, adjudication, or disposition of a child in grades nine through 12 to the principal of the school in which the child is registered and enrolled or registered and enrolled but suspended within *30 days*.[118]

C. Post-Disposition

Unlike criminal court, a juvenile court has an ongoing responsibility to monitor and protect the youth under its jurisdiction even beyond a disposition order.[119]

109 La. Child. Code Ann. art. 890(D) (2006).
110 La. Child. Code Ann. art. 891(A) (2006); *see In re M.W.,* 777 So.2d at 1290.
111 *Id.*
112 La. Child. Code Ann. art. 888(A) (2006); *see In re J.C.O.,* 877 So.2d at 1022.
113 La. Child. Code Ann. art. 889 (2006).
114 La. Child. Code Ann. art. 893(A) (2006); *see In re K.H.,* 98-632 (La. App. 5th Cir. 12/16/98); 725 So.2d 583, 587.
115 La. Child. Code Ann. art. 892 (2006); *In re J.C.O.,* 877 So.2d at 1025.
116 La. Child. Code Ann. art. 893(D) (2006); *see also In re S.T.,* 97-0216 (La. App. 1st Cir. 09/19/97); 699 So.2d 1128, 1129.
117 La. Child. Code Ann. art. 901(B) (2006).
118 La. Child. Code Ann. art. 891(D) (2006).
119 La. Child. Code Ann. art. 102 (2006); La. Child. Code Ann. art. 905 (2006); La. Child. Code Ann. art. 909 (2006); *see also*

1. Progress Reports

Upon request, any institution or agency to which a child is assigned must provide the court any information concerning the condition, supervision, treatment, or rehabilitation program of the child.[120] In addition, not less than once every *6 months,* the institution or agency shall report in writing the whereabouts and condition of the child to the judge who ordered the disposition.[121]

2. Required Reviews—Mental Health Commitment

A child who is found not guilty by reason of insanity or incompetent to proceed may be committed to a mental institution. The medical staff of the mental institution must review the child's record after the first 60 days of commitment, again after 120 days and every 180 days thereafter.[122] The purpose of the reviews is to determine the child's present mental condition and whether she is capable of being discharged—conditionally or unconditionally—or capable of being placed on probation, without being a danger to herself or others; or, in the case of incapacity, whether she is capable of proceeding.[123]

The court may modify a mental health commitment upon motion by the superintendent of the Department of Health and Hospitals ("DHH") or the superintendent of a private mental institution.[124] The court *shall not* issue a modification releasing a child found insane at the time of the offense from custody of the DHH or other institution except upon order of the court after motion and contradictory hearing.[125] The court issuing a modification *releasing a child adjudicated delinquent from custody* of the DHH or other institution must provide *3 days'* prior notice to the district attorney and DHH or other institution.[126]

3. Modification of Disposition

Generally, the court retains the power to modify its disposition order at any time.[127] The court may change the child's legal custody, suspend all or part of any order of commitment, discharge conditions of probation or add any further conditions.[128] The court may also terminate an order of disposition at any time while it is still in force.[129] A motion for modification of disposition may be filed by the district attorney,

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In re C.B., 97-2783 (La. 03/11/98); 708 So.2d 391, 396–397.

120 La. Child. Code Ann. art. 905(A) (2006)*; see In re L.A.H.,* 2002-1867 (La. App. 1st Cir. 12/20/02); 836 So.2d 447, 449; (Pettigrew, J., concurring).

121 La. Child. Code Ann. art. 905(B) (2006)*; see In re L.A.H.,* 836 So.2d at 449.

122 La. Child. Code Ann. art. 906(A) (2006).

123 La. Child. Code Ann. art. 906(B) (2006).

124 La. Child. Code Ann. art. 916(A) (2006).

125 La. Child. Code Ann. art. 916(C) (2006).

126 La. Child. Code Ann. art. 916(B) (2006).

127 La. Child. Code Ann. art. 909 (2006) (The court does not retain the authority to modify the disposition of certain felony-grade delinquent acts); *see* La. Child. Code Ann. art. 897(1) (2005)*; see In re D.W.,* 2003-2754 (La. 01/30/04); 865 So.2d 45, 46.

128 La. Child. Code Ann. art. 909 (2006).

129 La. Child. Code Ann. art. 909 (2006)*; see In re D.W.,* 865 So.2d at 46.

the child, his parents, the custodian of the child, a probation officer or by the court itself.[130]

A motion to modify seeking less restrictive conditions may be granted by the court without a contradictory hearing.[131] When the motion seeks to impose more restrictive conditions on the child, however, the court shall conduct a contradictory hearing.[132] The court may deny a motion seeking modification without providing a hearing to the moving party.[133]

A motion filed by the Department of Public Safety and Corrections Office of Youth Development ("OYD") seeking to make conditions less restrictive shall be tried contradictorily against the district attorney, unless the district attorney files in the record an affidavit averring no opposition to the motion.[134] The court issuing a modification releasing a child from custody of OYD must give *3 days'* prior notice to the district attorney and to OYD.[135]

4. Probation Revocation

The state may file a motion to revoke a child's probation,[136] wherein the court must hold a contradictory hearing unless the child waives her right.[137] In such a hearing, the child is entitled to the same constitutional protections as during adjudication, except that the state's burden of proof is clear and convincing evidence that the child violated a condition of probation or parole contained in the disposition order.[138]

If the conduct alleged as the basis for probation revocation also constitutes a delinquent act, a petition must be filed and a new delinquency case can be originated regarding the new offense.[139]

If the court finds the child violated a condition of her probation, the judge may impose a variety of sanctions, from reprimand to commitment to the custody of OYD.[140]

> Sanction Time Limitations (Revocation of Probation): If the court revokes probation and commits the child to secure custody, the length of the commitment may not exceed the maximum term of imprisonment for the offense forming the basis of the original adjudication.[141]

130 La. Child. Code Ann. art. 910 (2006); *see In re L.A.H.,* 836 So.2d at 449; *In re V.N.,* 97-1190 (La. App. 5th Cir. 04/15/98); 712 So.2d 954, 958.
131 La. Child. Code Ann. art. 910(C) (2006).
132 La. Child. Code Ann. art. 910(D) (2006).
133 La. Child. Code Ann. art. 910(B) (2006).
134 La. Child. Code Ann. art. 911(A) (2006); *see In re L.A.H.,* 836 So.2d at 449.
135 La. Child. Code Ann. art. 911(B) (2006); *see In re L.A.H.,* 836 So.2d at at 449; *In re V.N.,* 712 So.2d at 958.
136 La. Child. Code Ann. art. 913(A) (2006); *see In re C.C.,* 95 1425 (La. App. 1st Cir. 09/27/96); 680 So.2d 755, 758.
137 La. Child. Code Ann. art. 913(B) (2006).
138 *Id.*
139 La. Child. Code Ann. art. 915(C) (2006).
140 La. Child. Code Ann. art. 914(A) (2006).
141 La. Child. Code Ann. art. 915(A) (2006); *see e.g.In re M.G.T.,* 97-1021 (La. App. 3d Cir. 12/10/97); 704 So.2d 887, 889.

> Sanction Time Limitations (Contempt of Court): If a child is found in direct or constructive contempt of court, commitment for each contempt shall not exceed *15 days*, including time spent in detention for the contempt prior to adjudication for contempt.[142]

D. Appeal

1. Notice of Appeal

An appeal may be taken from any final judgment of the court and shall be to the appropriate court of appeal.[143] The appeal shall include all errors assigned concerning the adjudication and disposition. The effect of a judgment shall not be suspended by an appeal, unless the trial court or a court of appeal directs otherwise.[144]

> Deadline for Filing of Appeal: In delinquency proceedings, an appeal may be taken only *after a judgment of disposition*[145] and must be filed within *15 days* from the mailing of the notice of the judgment.[146] If a timely application for new trial is made, the deadline for filing an appeal commences to run from the date of the mailing of the notice of denial of the motion for new trial.[147]

Appeals in delinquency matters are expedited and shall be assigned by preference to the next docket or cycle following any required briefing schedule.[148]

2. Discretionary Review of Appeal

An application seeking review of the judgment and opinion of a decision of a court of appeal may be taken to the Louisiana Supreme Court.[149] An application seeking review of the judgment and opinion of a court of appeal must be made within *30 days* of the mailing of the notice of the judgment of the appellate court or, if rehearing is applied for, 30 days from the mailing of the notice of denial of rehearing or judgment on rehearing.[150]

E. Expungement

A person seventeen years of age or older may move to expunge her record of juvenile criminal conduct.[151] Generally, records concerning conduct or conditions that did not result in adjudication may be expunged.[152] The result of expungement is that the

142 La. Child. Code Ann. art. 915(B) (2006).
143 La. Child. Code Ann. art. 330(A) (2006); *see In re A.S.*, 97-0806 (La. 09/26/97); 701 So.2d 965, 965.
144 La. Child. Code Ann. art. 336 (2006); *see In re T.M.*, 03-929 (La. App. 3d Cir. 03/24/04); 869 So.2d 339, 343; *In re K.B.*, 30, 358 (La. App. 2d Cir. 08/21/97); 698 So.2d 761, 762.
145 La. Child. Code Ann. art. 330(B) (2006); *see In re Hair,* 98-560 (La. App. 3d Cir. 06/08/98); 715 So.2d 551, 551.
146 La. Child. Code Ann. art. 332(A) (2006); *see In re C.P. et al.,* 2000-2703 (La. 01/17/01); 777 So.2d 470, 471.
147 *Id.*
148 La. Cts. App. Unif. R. 5-3(b).
149 La. Sup. Ct. R. X. (2006).
150 La. Sup. Ct. R. X. §5(a) (2006).
151 La. Child. Code Ann. art. 917 (2006); *see State v. Mitchell,* 94-2599 (La. App. 4th Cir. 02/10/95); 650 So.2d 832, 833.
152 La. Child. Code Ann. art. 918(A) (2006).

conduct and conditions expunged are considered nonexistent and are to be treated as such upon inquiry.[153] Expungement of records that involve conduct that resulted in adjudication must meet additional criteria. See *Chapter 21: Expungement of Records* for more details regarding expungements.

153 La. Child. Code Ann. art. 922 (2006).

CHAPTER 5

THE CONSTITUTIONAL RIGHTS OF YOUTH IN DELINQUENCY PROCEEDINGS

Protecting the constitutional rights of a client is essential to ensuring justice in the juvenile court system. Juvenile defenders must be prepared at every stage of the process to champion the rights of children and youth. This chapter includes a discussion of the constitutional rights of children generally and provides an overview of constitutional criminal procedure including due process of law, the right to counsel, the right to a fair trial, waiver of constitutional rights, and other constitutional rights applicable to delinquency practice.

I. OVERVIEW

In 1967, the United States Supreme Court decided *In re Gault,* thereby establishing that constitutional protections for children and youth through the due process of law is the "indispensable foundation of individual freedom."[1] In deciding that children and youth are protected by constitutional rights in delinquency proceedings, the Court said:

> "If Gerald had been over 18...[t]he United States Constitution would guarantee him rights and protections with respect to arrest, search, and seizure, and pretrial interrogation. It would assure him of specific notice of the charges and adequate time to decide his course of action and to prepare his defense. He would be entitled to clear advice that he could be represented by counsel, and, at least if a felony were involved, the State would be required to provide counsel if his parents were unable to afford it. If the court acted on the basis of his confession, careful procedures would be required to assure its voluntariness. If the case went to trial, confrontation and opportunity for cross-examination would be guaranteed. So wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and reasons more persuasive than cliché can provide."[2]

The *Gault* Court held that due process requires that a youth in delinquency proceedings have notice of the charges against him, the right to counsel, the right to confrontation and cross-examination, and the privilege against self-incrimination. In the cases that followed *Gault,* the Supreme Court continued to incorporate constitutional procedural rights into delinquency proceedings. For instance, in *In re Winship,* the

1 *In re Gault,* 387 U.S. 1, 20 (1967).
2 *Id.* at 29-30.

Court established the state's burden of proof in delinquency proceedings as beyond a reasonable doubt[3] and in *Breed v. Jones,* the Court held that children and youth are protected by the double jeopardy clause of the Fifth Amendment.[4] However, in *McKeiver v. Pennsylvania,* the Court stopped short of providing children and youth the right to a jury trial, holding that the United States Constitution allows but does not require jury trials in juvenile proceedings.[5]

The State of Louisiana has supplemented the rights guaranteed to children under the United States Constitution. The Louisiana Constitution, Article V, § 19 mandates special juvenile procedures for youth alleged to have committed a crime before the age of 17:

> The determination of guilt or innocence, the detention, and the custody of a person who is alleged to have committed a crime prior to his seventeenth birthday shall be pursuant to special juvenile procedures which shall be provided by law.[6]

Special procedures for children and youth can be found in the Louisiana Children's Code, which was first passed by the state legislature in 1991.[7] The Children's Code provides juveniles in delinquency proceedings all rights guaranteed to criminal defendants by the Constitution of the United States or the Constitution of Louisiana, except the right to a jury trial.[8]

II. DUE PROCESS AND THE FUNDAMENTAL FAIRNESS STANDARD

The Louisiana Supreme Court recognizes a *quid pro quo* in the juvenile court system whereby juveniles do not enjoy every constitutional protection guaranteed adults because children receive rehabilitative treatment rather than punitive incarceration.[9] The Court is guided by this *quid pro quo* policy in determining which constitutional rights are guaranteed to juveniles under the dictates of fundamental fairness inherent in the Due Process Clause of the Fourteenth Amendment.[10] "[D]ue process and...fundamental fairness do not require that every constitutional right guaranteed to adults be automatically granted to juveniles,"[11] but the Due Process Clause does command a *fundamentally fair result*.[12] Fundamental fairness is, therefore, the stan-

3 *In re Winship,* 397 U.S. 358, 368 (1970).
4 *Breed v. Jones,* 421 U.S. 519 (1975).
5 *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971)*; see also In re D.J.,* 2001-2149 (La. 05/14/02); 817 So.2d 26*; In re Dino,* 359 So. 2d 586 (La. 1978).
6 La. Const. art. V, § 19.
7 La. Child. Code Ann. (1991)
8 La. Child. Code. Ann. art. 808 (2006); *see also In re D.J.,* 817 So.2d 26*; In re Dino,* 359 So.2d 586.
9 *In re C.B.,* 97-2783, 10 (La. 03/11/98); 708 So.2d 391, 397 (citing *Doe v. McFaul,* 599 F. Supp. 1421, 1428 (N.D. Ohio, 1984); *Baker v. Hamilton,* 345 F. Supp. 345, 352 (W.D.Ky. 1972); *Osorio v. Rios,* 429 F. Supp. 570, 574 (D.C. Puerto Rico 1976)).
10 *In re C.B.,* 708 So.2d at 397 (citing *In re Gault,* 387 U.S. 1 (1967)); *In re Banks,* 402 So.2d 690, 694 (La. 1981); *In re Causey,* 363 So.2d 472 (La. 1978).
11 *In re C.B.,* 708 So.2d at 397 (citing *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971)).
12 *In re C.B.,* 708 So.2d at 397 (citing *McKeiver,* 403 U.S. 528 at 554).

dard by which the court determines whether a particular safeguard is required in a juvenile delinquency adjudication in order to satisfy the "essentials of due process and fair treatment."[13]

The Louisiana Supreme Court has adopted the case-by-case analysis of juvenile proceedings employed by the United States Supreme Court in *McKeiver v. Pennsylvania*.[14]

> Under this analysis, an attempt is made to strike a judicious balance by injecting procedural orderliness into the juvenile court system...to reverse the trend whereby "the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[15]

Utilizing the *McKeiver* analysis, the Louisiana Supreme Court inquires whether an asserted right was historically part of fundamental fairness and whether giving the right in question to the juvenile offender would hamper any of the beneficial aspects of the juvenile proceeding.[16] The Court noted that, "[o]nly those rights that are both 'fundamental' and 'essential,' in that they perform a function too important to sacrifice in favor of the benefits afforded by the civil-style juvenile proceeding, have been held to be required in such proceedings."[17] Based on this analysis, the Louisiana Supreme Court has determined that a juvenile has a right to plead not guilty by reason of insanity, the right to a hearing to determine mental capacity,[18] the right to bail pending adjudication[19] and the right to a public trial.[20] In keeping with the tone set by the United States Supreme Court, the Louisiana Supreme Court has also found that due process and fundamental fairness do not require that a juvenile be granted the right to trial by jury.[21]

III. RIGHT TO NOTICE OF CHARGES

The United State Supreme Court discussed a child's right to notice of the charges against him in *In re Gault:*

> Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must "set forth the alleged

13 *In re C.B.,* 708 S.2d at 397 (citing *In re Winship,* 397 U.S. 358, 359 (1970)); *In re Banks,* 402 So.2d 690; *In re Causey,* 363 So.2d 472.
14 *In re C.B.,* 708 S.2d at 397–398 (citing *In re Causey,* 363 So.2d, at 474); *see also In re Banks,* 402 So.2d 690; *In re Batiste,* 367 So.2d 784 (La. 1979); *In re Dino,* 359 So.2d 586 (La. 1978); *McKeiver*, 403 U.S. 528.
15 *In re C.B.,* 708 S.2d at 398 (citing *McKeiver*, 403 U.S. at 545; *Kent v. United States,* 383 U.S. 541, 556 (1966)).
16 *In re C.B.,* 708 S.2d at 398 (citing *In re Causey,* 363 So.2d at 474).
17 *Id.*
18 *Id.*
19 *In re C.B.,* 708 S.2d at 398 (citing *State v. Hundley,* 267 So.2d 207 (La. 1972)); *In re Aaron,* 390 So.2d 208 (La. 1980).
20 *In re C.B.,* 708 S.2d at 398 (citing *In re Dino*, 359 So.2d 586).
21 *In re D.J.,* 2001-2149 (La. 05/14/02); 817 So.2d 26; *In re Dino,* 359 So.2d 586.

> misconduct with particularity." ...The "initial hearing" in the present case was a hearing on the merits. Notice at that time is not timely; and even if there were a conceivable purpose served by the deferral proposed by the court below, it would have to yield to the requirements that the child and his parents or guardian be notified, in writing, of the specific charge or factual allegations to be considered at the hearing, and that such written notice be given at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation. Due process of law requires notice of the sort we have described—that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding. It does not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet.[22]

The Louisiana Constitution Article I, § 13 also provides that a defendant has the right to be informed of the nature and cause of the accusations against her.[23] Article 855 of the Louisiana Children's Code further provides that the court must advise the child of the nature and cause of the accusation against her at the initial appearance or the appearance to answer the petition.[24]

22 *In re Gault,* 387 U.S. 1, 33–34 (1967) (footnotes omitted).

23 La. Const. art. I, § 13.

24 La. Child. Code Ann. art. 855 (2006) (Requiring the court to advise the child of the nature of the delinquency proceeding, the nature of the allegations in the petition, her right to an adjudication hearing, her right to be represented by an attorney, her privilege against self-incrimination, the range of answers available to the child or youth (admission, denial, denial by reason of insanity and *nolo contendre*) and the possible consequences of her admission.))

The child requires the guiding hand of counsel at every step in the proceedings against him.[25]

IV. RIGHT TO COUNSEL

The right to counsel is guaranteed by the Fifth and Sixth Amendments of the United States Constitution and was made applicable to states as a part of Fourteenth Amendment Due Process in *Gideon v. Wainwright*.[26] The Sixth Amendment provides for a right to counsel expressly while the Fifth Amendment right to counsel is a judicially created right which attaches when an individual is in peril of self-incrimination in the face of pressure created by a "police-dominated atmosphere."[27] *In re Gault* extended the right to counsel to juveniles where delinquency proceedings might lead to commitment in a state institution.[28] The *Gault* Court stated:

> We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.[29]

The Fifth and Sixth Amendments to the United States Constitution guarantee the right to counsel at all "critical stages of the proceeding."[30] The Louisiana Children's Code, however, provides children charged with delinquent acts an even more expansive right to counsel. Article 809 of the Children's Code states "[a]t *every stage of proceedings* [sic]...the accused child shall be entitled to counsel."[31] It further mandates, "[I]f the court finds that the parents of the child are financially unable to afford counsel for the child, the court shall appoint counsel, or refer the child for representation by the indigent defender board."[32]

Although Louisiana provides counsel at every stage of the process for children in delinquency proceedings, the courts use the Sixth Amendment "critical stage" anal-

25 *In re Gault,* 387 U.S. at 35 (citing *Powell v. State of Alabama,* 287 U.S. 45, 61 (1932); *Gideon v. Wainwright,* 372 U.S. 335 (1963)).
26 U.S. Const. amend. V, VI; *Gideon,* 372 U.S. 335.
27 *Miranda v. Arizona,* 384 U.S. 436 (1966).
28 *In re Gault,* 387 U.S. at 41.
29 *Id.*
30 La. Const. art. I, § 1; *United States v. Wade,* 388 U.S. 218, 224 (1967).
31 La. Child. Code Ann. art. 809 (2006) (emphasis added).
32 *Id.*

ysis for determining whether or not a defendant was denied his Sixth Amendment right to counsel. The United States Supreme Court has held that "critical stages" include arraignment,[33] the initiation of formal judicial proceedings (formal charge, preliminary hearing, indictment, information or arraignment)[34] and interrogation.[35]

The test for determining "critical stage" is enunciated in *United States v. Wade*[36] and is necessarily dependent on the facts and the circumstances facing the accused. In *Wade,* the Court stated that a critical stage is one where there is "risk that...counsel's absence...might derogate from [a defendant's] right to a fair trial."[37] The Court must consider "whether the presence of counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself."[38] The court should "analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice."[39]

A. Right to Counsel—Interrogation

Although the accused is guaranteed the right to counsel in the interrogation context by the Fifth Amendment, she must invoke this right to counsel before it is recognized. After invocation, all questioning by law enforcement personnel must cease, unless the accused initiates discussion herself.[40]

While all those arrested must be issued Miranda warnings, Miranda warnings are "not themselves rights, but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected."[41] If the accused has not felt any compulsion by the government to self-incriminate, then the Fifth Amendment right to counsel does not attach.[42] For example, in *Moran v. Burbine,* the United States Supreme Court held the waiver of counsel valid because it was made with "full awareness and comprehension of all the information Miranda requires the police to convey,"[43] even though the family of the accused had procured an attorney, and the attorney was being denied access to his client.

33 *Powell v. Alabama,* 287 U.S. 45 (1923).
34 *Moran v. Burbine,* 475 U.S. 412, 429 (1986); *United States v. Gouveia,* 467 U.S. 180, 187 (1984); *Kirby v. Illinois,* 406 U.S. 682, 689 (1972) (opinion of Stewart, J.).
35 *Moran,* 475 U.S. at 453; *Brewer v. Williams,* 430 U.S. 387, 390 (1977); *Miranda v. Arizona,* 384 U.S. 436 (1966).
36 *United States v. Wade,* 388 U.S. 218 (1967).
37 *Wade*, 388 U.S. at 228.
38 *Id.* at 227.
39 *Id*.
40 *Moran,* 475 U.S. 412 (The interrogation context assumes that the youth has been informed of her right to counsel by way of Miranda warnings.); *see, e.g., Brewer v. Williams,* 430 U.S. 387 (1977).
41 *New York v. Quarles,* 467 U.S. 649, 654 (1984) (citing *Michigan v. Tucker,* 417 U.S. 433, 444 (1974)).
42 *Moran,* 475 U.S. 412; *see also Illinois v. Perkins,* 496 U.S. 292 (1990).
43 *Moran,* 475 U.S. at 424.

B. Right to Counsel—Sentencing

"The constitutional right to the assistance of counsel provided by the Sixth Amendment...mandates the right, unless waived, to the assistance of counsel...[at] an initial or deferred sentencing."[44] "Both the United States Supreme Court and [the Louisiana Supreme Court] have held that a defendant has the constitutional right to have counsel present during his sentencing, which is a "critical stage" of his prosecution."[45] A "[s]entence imposed without the presence of [a] defendant's attorney is illegal and of no effect, for certain vital issues cannot be raised and important rights may be lost if not raised or exercised prior to this stage of the proceedings."[46] "Unless a defendant has made a knowing and intelligent waiver of his right to counsel, any sentence imposed in the absence of counsel is invalid and must be set aside."[47]

C. Right to Counsel—Post-Adjudication

Children and youth also have a right to counsel post-adjudication. Youth have a constitutional right to access to courts that is identical to adults' right to such access.[48] In *Germany v. Vance,* the United States Appellate Court for the First Circuit recognized that juveniles and adults acquire a similar stigma as persons convicted or adjudicated of violating the law, and that both are effectively incarcerated.[49] Therefore, since *Gault* guarantees a juvenile the right to counsel during the adjudication stage,[50] and the juvenile has a right to appeal from the adjudication under state law, then he must also have the right to counsel on the first appeal.[51] In addition, an incarcerated youth has a constitutional right to assistance in gaining access to courts to file his grievances.[52] The Louisiana Children's Code further provides youth with the right to counsel at "every stage" of proceedings.[53]

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44 *State v. LeFeure,* 01-1003 (La. App. 5th Cir. 01/05/02); 807 So.2d 922, 923 (citing *McConnell v. Rhay,* 393 U.S. 2 (1968)).
45 *State of Louisiana v. Paul E. Chighazola,* 281 So. 2d 702, 704 (La. 1973) (citing *McConnell v. Rhay,* 393 U.S. 2 (1968); *Mempa v. Rhay,* 389 U.S. 128 (1967); *State v. Coody,* 275 So.2d 773 (La. 1973); *State v. Austin,* 229 So.2d 717 (1969)).
46 *LeFeure,* 807 So.2d at 924 (citing *State v. Austin,* 229 So. 2d 717, 718 (La. 1969)).
47 *LeFeure,* 807 So.2d at 924 (citing *State v. Williams,* 374 So. 2d 1215, 1217 (La. 1979)); *State v. Hall,* 99-2887 (La. App. 4th Cir. 10/04/00); 775 So. 2d 52, 62–63.
48 *Germany v. Vance,* 868 F.2d 9 (1st Cir. 1989); *Morgan v. Sproat,* 432 F. Supp. 1130 (S.D. Miss. 1977); *see, e.g., Bounds v. Smith,* 430 U.S. 817 (1977).
49 *Germany,* 868 F.2d 9.
50 *In re Gault,* 387 U.S. 1 (1967)
51 *United States v. M.I.M.,* 932 F.2d 1016 (1st Cir. 1991) (citing *Penson v. Ohio,* 488 U.S. 75, 84–84 (1988); *Douglas v. California,* 372 U.S. 353, 355–356 (1963)).
52 *Morgan,* 432 F. Supp. 1130 (holding that juveniles committed to state "training schools" have a constitutional right of access to courts, and that state must make that right meaningful by taking affirmative steps to assist them in gaining access to courts to file their grievances); *see also Bounds v. Smith,* 430 U.S. 817 (1977) (holding that right to access the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law).
53 La. Child. Code Ann. art. 809 (2006).

V. RIGHT TO FAIR TRIAL

"The right to a fair trial is a fundamental liberty secured by the Sixth Amendment through the Due Process Clause of the Fourteenth Amendment to the United States Constitution"[54] and by Article I, § 16 of the Constitution of the State of Louisiana.[55] In *State in the Interest of A.H.,* the Third Circuit Court of Appeals of Louisiana held that juveniles have a right to a fair and impartial trial.[56]

A. The Presumption of Innocence

"The presumption of innocence, although not [specifically] articulated in the United States Constitution, is a basic component of a fair trial under our system of criminal justice."[57] "[U]nder Article I, § 16 of the Louisiana Constitution, every person charged with a crime is entitled to an impartial trial."[58]

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law axiomatic and elementary; and its enforcement lies at the foundation of the administration of our criminal law."[59] "To implement the presumption [of innocence], courts must be alert to factors that may undermine the fairness of the fact-finding process.... [C]ourts must carefully guard against the dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt."[60] "Indeed, 'two of the most fundamental features of our criminal justice system are the presumption of innocence and the requirement that the state prove each element of a crime beyond a reasonable doubt.'"[61] It follows from the presumption of innocence that an accused has the absolute right not to plead guilty.[62]

B. The Right to a Speedy Trial

"The right to a speedy trial is guaranteed by both the federal and state constitutions."[63] "This right attaches when an individual becomes an accused, either by formal indictment or bill of information or by arrest and actual restraint."[64] In determining whether or not the defendant was denied his right to a speedy trial, the court must weigh the conduct of both the defendant and the prosecutor in light of four factors: 1) length of the delay; 2) reasons for delay; 3) assertion of the right and 4) prejudice to the defendant.[65] In *State v. Nowell,* the Louisiana Supreme Court held that a 12-

54 U.S. Const. amend. VI, XIV; *State v. Jones,* 98-1165 (La. App. 3d Cir. 02/03/99); 734 So.2d 670, 672 (citing *Drope v. Missouri,* 420 U.S. 162, 172 (1975)).
55 La. Const. art. I, § 16.
56 *In re A.H.,* 95-1094 (La. App. 3d Cir. 01/31/96); 670 So.2d 361, 367–368 (citing *In re Dino,* 359 So.2d 586 (La. 1978) (cert denied, 493 U.S. 1047 (1978)); *In re Gault,* 387 U.S. 1 (1967)).
57 *Jones,* 734 So.2d at 672 (citing *Estelle v. Williams,* 425 U.S. 501, 503 (1976)).
58 *Jones*, 734 So.2d at 672-73 (citing La. Const. art. I, § 16).
59 *Jones,* 734 So.2d at 673 (citing *Coffin v. United States,* 156 U.S. 432, 453 (1895)).
60 *Jones,* 734 So.2d at 673 (citing *Estelle v. Williams,* 425 U.S. at 503*); In re Winship,* 397 U.S. 358, 364 (1970).
61 *Jones,* 734 So.2d at 673 (quoting *State v. Taylor,* 396 So.2d 1278, 1279-80 (La.1981)).
62 *Jones,* 734 So.2d at 673.
63 *State v. Nowell,* 363 So. 2d 523, 525 (La. 1978) (citing U.S. Const. amend. VI; La. Const. art. I, § 16).
64 *Nowell*, 363 So. 2d at 525 (citing *Barker v. Wingo,* 407 U.S. 514 (1972)); *United States v. Marion,* 404 U.S. 307 (1971); *State v. Fraise,* 350 So.2d 154 (La. 1977).
65 *Nowell*, 363 So.2d at 525–526 (citing *State v. Kemp,* 359 So.2d 978 (La. 1978); *State v. Bullock,* 311 So.2d 242 (La. 1975)).

month delay between the defendant's arrest and incarceration and the date counsel was appointed to represent him was sufficiently great and the defendant suffered prejudice as a result of the delay.[66]

Impairment of a defendant's ability to prepare his case is the most serious form of prejudice resulting from a delayed trial.[67] Prejudice can also occur in other ways, however, including interference with the defendant's liberty, disruption of employment and public shame, as well as create anxiety for the defendant, his family and his friends.[68] A speedy trial is particularly important for delinquency proceedings and the Louisiana Children's Code provides for expedited adjudication in juvenile court proceedings.[69]

C. No Juvenile Shall be Compelled to Give Evidence Against Herself

"Every criminal defendant is privileged to testify in his own defense, or to refuse to do so."[70] The Fifth Amendment's privilege against self-incrimination is fulfilled only when the defendant's choice regarding whether to testify is "unfettered."[71]

D. The Right to Confront and Cross-Examine Witnesses

The Sixth Amendment of the United States Constitution and Article 1, § 16 of the Louisiana Constitution guarantee an accused in a criminal prosecution the right to confront the witnesses against him.[72] "The essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination."[73] The Louisiana Constitution explicitly guarantees defendants the right of cross-examination: "An accused is entitled to confront and cross-examine the witnesses against him...."[74]

A trial court is vested with much discretion in controlling the scope and extent of cross-examination as well as redirect examination, and trial court rulings are not to be disturbed on appeal absent an abuse of that discretion.[75] However, "[t]he cross-examiner is not only permitted to delve into the witness's story to test his perceptions and memory, but has traditionally been allowed to impeach the witness."[76] In addition, "[u]nder both [the federal and state] constitutions, the exposure of a witness' motivation in testifying is a proper right of cross-examination."[77]

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66 *Nowell,* 363 So.2d at 526.
67 *Id.*
68 *Id.* (citing *State ex rel. Miller v. Craft,* 337 So.2d 1191 (La. 1976); *United States v. Marion,* 404 U.S. 307 (1971)).
69 La. Child. Code Ann. art. 318, 408 (2006).
70 *Harris v. New York,* 401 U.S. 222, 225 (1971).
71 U.S. Const. amend. V; *Harris,* 401 U.S. at 229.
72 U.S. Const. amend. VI; La. Const. art. I, § 16.
73 *State v. Anderson,* 99-456 (La. App. 5th Cir. 10/26/99); 750 So.2d 1008, 1011 (citing *Davis v. Alaska,* 415 U.S. 308 (1974); *State v. McIntyre,* 97-876 (La. App. 5th Cir. 01/27/98); 708 So. 2d 1071 (writ denied, 98-1032 (La. 09/18/98); 724 So. 2d 753)).
74 La. Const. art. 1, § 16.
75 *State v. Anderson,* 99-456 (La. App. 5th Cir. 10/26/99); 750 So.2d 1008, 1011 (citing *State v. Garrison,* 400 So. 2d 874 (La. 1981); *State v. Brooks,* 94-1031 (La. App. 5th Cir. 05/30/95); 656 So. 2d 772)).
76 *State v. Robinson,* 2002-1253 (La. App. 5th Cir. 04/09/03); 846 So.2d 76, 82 (citing *State v. Nash,* 475 So. 2d 752, 754 (La. 1985); *State v. Charles,* 00-1586 (La. App. 5th Cir. 06/27/01); 790 So. 2d 705, 708)).
77 *State v. Reed,* 441 So.2d 1259, 1261 (La. App. 1st Cir. 1983); *see United States v. Davis,* 415 U.S. at 316; *Greene v. McElroy,* 360 U.S. 474, 496 (1959).

"The right of cross-examination is a significant legislatively and constitutionally protected right in a delinquency proceeding."[78] Citing *In re Gault,* the Louisiana Supreme Court observed in *In re Dino,* "[t]he constitutional privilege against self-incrimination and the rights to counsel and to confront and cross-examine witnesses are applicable in the case of juveniles as they are with respect to adult accuseds."[79]

"A party is entitled to exercise the right of cross-examination personally and cannot be relegated to acceptance of the cross-examination conducted by another party (even one with a similar motive for cross-examination)."[80]

E. The Right to Compel the Attendance of Witnesses

The Louisiana Constitution "provides in pertinent part: 'an accused is entitled to confront and cross-examine the witnesses against him, *to compel the attendance of witnesses,* to present a defense, and to testify in his own behalf.'"[81]

"A defendant's right to compulsory process is the right to demand subpoenas for witnesses and the right to have those subpoenas served."[82] If such subpoena rights are denied a defendant at the trial level, the defendant must raise the issue before the trial court to preserve her right to appeal on the issue.[83]

In *State v. Mizell*, the Louisiana Supreme Court observed, "the constitutional right to compulsory process for the attendance of witnesses is not to be trifled with."[84] The right to compulsory process applies to juvenile adjudicatory and dispositional hearings.[85]

F. The Right to Present a Defense

"The Sixth Amendment of the United States Constitution and Article 1, § 16 of the Louisiana Constitution guarantee an accused in a criminal prosecution the right to present a defense."[86] "To this end, a criminal defendant should be allowed to present evidence on any relevant matter."[87] Furthermore, evidentiary rules may not supersede the fundamental right to present a defense.[88]

78 *In re Giangrosso,* 395 So.2d 709 (La. 1981) (citing La. Const. Art. I, § 16; *Kent v. United States,* 383 U.S. 541 (1966); *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971)).
79 *In re Dino,* 359 So.2d 586, 589 (La. 1978).
80 *In re Giangrosso,* 395 So.2d at 713.
81 *In re Sterling,* 441 So.2d 372, 373 (La. App. 5th Cir. 1983) (emphasis added); La. Const. art. I, § 16.
82 *State v. Gordon,* 00-1013 (La. App. 5th Cir. 11/27/01); 803 So.2d 131, 148 (citing U.S. Const. amend. VI; La. Const. art. I, § 16; La. Code Crim. Proc. Ann. art. 731 (2006)).
83 *Gordon,* 803 So.2d at 148.
84 *State v. Mizell,* 341 So.2d 385, 388 (La. 1976).
85 *In re Sterling,* 441 So.2d at 374.
86 *State v. Anderson,* 99-456 (La. App. 5th Cir. 10/26/99); 750 So.2d 1008, 1011 (citing *Washington v. Texas,* 388 U.S. 14 (1967); *State v. Hamilton,* 441 So. 2d 1192 (La. 1983); *State v. Calloway,* 97-796 (La. App. 5th Cir. 08/25/98); 718 So. 2d 559 (writs denied, 98-2435, 98-2438 (La. 01/8/99); 734 So. 2d 1229)); U.S. Const. amend. VI; La. Const. art. I, § 16. *See also State v. Lee,* 782 So.2d 1063 (La. App. 5th Cir. 01/30/01); *State v. Casey,* 99-0023 (La. 01/26/00); 775 So.2d 1022.
87 *Casey*, 775 So.2d at 1037 (citing *State v. Shoemaker,* 500 So.2d 385 (La. 1987)).
88 *See State v. Van Winkle,* 94-0947 (La. 06/30/95); 658 So.2d 198; *Chambers v. Mississippi,* 410 U.S. 284 (1973).

G. The Right to Testify

The United States Supreme Court has recognized that a criminal defendant's right to testify is fundamental and personal to the defendant. "Only such basic decisions as to whether to plead guilty, waive a jury, *or testify in one's own behalf* are ultimately for the accused to make."[89] The Supreme Court has held "there [is] no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution's case."[90]

"[T]he United States Supreme Court has been unequivocal in holding that the defendant's right to testify is guaranteed by: (1) the Fifth Amendment's privilege against self-incrimination; (2) the Sixth Amendment's Compulsory Process Clause; and (3) the Fourteenth Amendment's Due Process Clause."[91] "The Louisiana Constitution also specifically guarantees the defendant the right to testify in his own defense."[92]

"The defendant cannot be denied an opportunity to call himself—the most powerful witness to testify on his behalf."[93] "[T]he defendant's right to testify [is] among those protections without which a criminal trial is 'structurally flawed.'"[94] In *State v. Hampton,* the Louisiana Supreme Court held that "whenever a defendant is prevented from testifying, after unequivocally expressing his desire to do so, the defendant has been denied a fundamental right and suffers detrimental prejudice."[95]

In *State v. Johnson*, the Fourth Circuit Court of Appeals for the State of Louisiana held that the trial court's refusal to allow the defendant to testify was a denial of his constitutional rights.[96] In *Johnson*, the defendant stated his desire to testify despite his attorney's advice to the contrary. The trial court ignored the defendant's request and proceeded directly to closing argument.[97] The Fourth Circuit held;

> La. Const. of 1974 Art. 1, Section 16 provides that "an accused is entitled... to testify in his own behalf." Nothing in the record justifies, nor are we sure that anything could justify, the trial court's refusal to allow defendant to exercise this constitutional right.[98]

89 *Wainwright v. Sykes,* 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring) (emphasis added); *see also Jones v. Barnes,* 463 U.S. 745, 751 (1983); *Brooks v. Tennessee,* 406 U.S. 605 (1972).
90 *Ferguson v. Georgia,* 365 U.S. 570, 582 (1961).
91 *State v. Hampton,* 00-0522 (La. 03/22/02); 818 So.2d 720, 723-724 (citing *Rock v. Arkansas,* 483 U.S. 44 (1987)); U.S. Const amend. V, VI, XIV.
92 *Hampton,* 818 So.2d at 724; La. Const. art. 1, § 16.
93 *Hampton,* 818 So.2d at 728.
94 *Hampton,* 818 So.2d at 729.
95 *Id.*
96 *State v. Johnson,* 482 So.2d 146, 147 (La. App. 4th Cir. 1986).
97 *Id.*
98 *Id.*

VI. ANCILLARY CONSTITUTIONAL RIGHTS

A. Rights at Arrest/Interrogation

Children and youth taken into custody are protected by all rights guaranteed to adult criminal defendants upon arrest. The Louisiana Children's Code Article 812 states, "[t]he taking of a child into custody is not an arrest, except for the purpose of determining its validity under the Constitution of the United States."[99]

The Louisiana Constitution requires a defendant to be advised of the following upon arrest[100]:

(a) the reason for her arrest or detention;

(b) her right to remain silent;

(c) her right against self-incrimination;

(d) her right to the assistance of counsel; and

(e) if indigent, her right to court appointed counsel.

In *State v. Fernandez*, the Louisiana Supreme Court also recognized constitutional rights during a custodial interrogation for juveniles stating:

> [Louisiana Constitution] art. I, § 13 incorporates the prophylactic rules of *Miranda v. Arizona,* which require that a prosecutor, before using an accused's confession at trial, establish that the accused was informed of his or her rights against self-incrimination and to have an attorney present at any interrogation; that the accused fully understood the consequences of waiving those rights; and that the accused in fact voluntarily waived those rights without coercion. The constitutional privilege against self-incrimination and the constitutional right to counsel apply to juveniles as well as to adults.[101]

B. Right to Bail

Louisiana Constitution Article I, § 18 and ChildrenÐs Code Article 823 guarantee the right to bail for children and youth in delinquency proceedings.[102] In *In re Banks,* the Louisiana Supreme Court held that "fundamental fairness mandates that juveniles be admitted to bail pending adjudication."[103] Bail "allow[s] the juvenile to be free pending adjudication and preserves the presumption of innocence."[104]

99 La. Child. Code Ann. art. 812.
100 La. Const. art. I, § 13.
101 *State v. Fernandez,* 96-2719 (La. 04/14/98); 712 So.2d 485, 486 (internal citations omitted) (citing *In re Gault,* 387 U.S. 1 (1967); *State ex rel. Coco,* 363 So. 2d 207, 208 (La. 1978) (recognizing that juveniles are entitled to same constitutional protections as adults)).
102 La. Const. art. I, § 18; La. Child. Code Ann. art. 823 (2006).
103 *In re Banks,* 402 So.2d 690, 695 (La. 1981) (citing *State v. Hundley,* 267 So.2d 207 (1972) (ordering the trial court to grant bail to two young girls pending their delinquency adjudications) (relying on *In re Gault,* 387 U.S. 1 (1967), and *State v. Franklin,* 12 So.2d 211 (1943))). *See also In re Aaron,* 390 So.2d 208 (La. 1980).
104 *In re Banks,* 402 So.2d at 695 (citing Comment, *Juvenile Right to Bail,* 11 J. Fam. L. 81, 100-01 (1971)).

C. Appeal

Louisiana Constitution Article I, § 19 and the Louisiana Children's Code Article 331 guarantee a juvenile's right to appeal.[105] However, "an appeal may be taken only after a judgment of disposition."[106] Absent a record of a dispositional hearing, a Court of Appeal does not have jurisdiction to review a delinquency case on appeal; the judgment of disposition is a prerequisite for appellate review.[107]

D. The Right to Writ of Habeas Corpus[108]

"*Habeas corpus* is a writ of inquiry in aid of an individual's constitutional and fundamental right to freedom and liberty and is the proper remedy to obtain relief from illegal custody or detention."[109]

"The writ of habeas corpus has long been a fixture of Louisiana law. The Louisiana Constitutions of 1921, 1913, 1898, 1879, 1864, 1852, 1845, and 1812 contained a [habeas corpus] provision similar to the provision contained in the current 1974 constitution."[110] "Traditionally, the writ of habeas corpus was used to: (1) insure that necessary pre-trial procedures were followed; (2) examine whether the person had been committed pursuant to judicial process; and (3) ascertain whether the committing court had jurisdiction."[111]

E. Access to the Courts

"Incarcerated juveniles have a constitutional right of access to the courts."[112] A prisoner's right of access to courts can be found in the Due Process Clause of the Fourteenth Amendment,[113] the Equal Protection Clause of the Fourteenth Amendment,[114] and the First Amendment[115] to the United States Constitution. The Louisiana Constitution Article I, § 22 also provides:

> [E]very person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.

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105 La. Const. art. I, § 19; La. Child. Code Ann. art. 331 (2006).
106 *In re J.W.,* 01-135, (La. App. 5th Cir. 06/27/01); 791 So.2d 160, 162.
107 *Id.*
108 La. Const. art. I, § 21.
109 *Harrison v. Norris,* 21-677 (La. App. 2d Cir. 10/31/90); 569 So.2d 585.
110 *State ex rel. Glover v. State,* 93-2330 (La. 09/05/95); 660 So.2d 1189, 1195, n.5.
111 *Glover*, 660 So.2d at 1196 (citing *Swain v. Pressley,* 430 U.S. 372, 385 (1977) (Burger, Blackmun, and Rehnquist, J.J., concurring in part and concurring in the judgment) (citing Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 468 (1966))).
112 *John L. v. Adams,* 969 F.2d 228, 233 (6th Cir. 1992); La. Const. art. I § 22; *Morgan v. Sproat,* 432 F. Supp. 1130 (S.D. Miss. 1977); *Germany v. Vance,* 868 F.2d 9 (1st Cir. 1989).
113 U.S. Const. amend. XIV; *see Ex parte Hull,* 312 U.S. 546 (1941) (invalidating a prison regulation which required that all petitions for writ of habeas corpus be screened by the prison legal investigator before they could be sent to the court); *Johnson v. Avery,* 393 U.S. 483, 490 (1969) (holding that unless the state provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation that bars inmates from furnishing such assistance to other prisoners); *Wolff v. McDonnell,* 418 U.S. 539 (1974) (holding that the right of access to courts extended beyond habeas corpus petitions to civil rights actions); *Bounds v. Smith,* 430 U.S. 817 (1977).
114 U.S. Const. amend. XIV; *Murray v. Giarratano,* 492 U.S. 1 (1989).
115 U.S. Const. amend. I; *Hudson v. Palmer,* 468 U.S. 517, 523 (1984) (citing *Johnson v. Avery,* 393 U.S. at 490).

In *Morgan v. Sproat*, a federal district court in Mississippi addressing the conditions of confinement in a juvenile institution, held that the constitutional right of access to the courts applied to juveniles who had been committed to state "training" schools.[116] The court found no distinction between incarcerated adults and incarcerated juveniles regarding the right of access to courts.[117] The court in *Morgan* applied the United States Supreme Court's decision in *Johnson v. Avery*,[118] finding that the right of access not only prohibits the State from interfering with incarcerated individuals' access to the courts, it means that the State must take affirmative steps "to enable prisoners to place their grievances before the judicial system."[119]

In *Germany v. Vance*, the United States Court of Appeals for the First Circuit rejected "any implication that the constitutional right of access to the courts does not apply to juveniles in...custody."[120] In *John L. v. Adams*, the United States Court of Appeals for the Sixth Circuit concurred, noting: "Like the courts in *Morgan* and *Germany*, we see no logical reason why the right of access should not be applied to incarcerated juveniles. We therefore hold that plaintiffs, as incarcerated juveniles, have a constitutional right of access to the courts."[121] The *John L.* Court also noted that it found "additional support for this conclusion in decisions holding that the right of access applies to other groups who are in the custody of the State. These groups include persons serving brief sentences in local jails, pretrial detainees, and mental patients under commitment."[122]

In order to assure that incarcerated persons have meaningful access to courts, states are required to provide affirmative assistance in the preparation of legal papers in cases involving constitutional rights and other civil rights actions related to their incarceration.[123] Prison officials must assure that inmate access to the courts is "adequate, effective and meaningful."[124] What constitutes meaningful access will vary with the circumstances and officials are permitted some discretion in determining how the right will be administered.[125]

F. Right to Treatment

One Constitutional right critical to the adequate representation of juveniles is the right to treatment. The Louisiana Constitution guarantees juveniles the right to humane treatment, including the prohibition against cruel, excessive, or unusual punishment.[126]

116 *Morgan*, 432 F. Supp. at 1158.
117 *Id.*
118 *Johnson v. Avery,* 339 U.S. 483 (1969).
119 *Morgan*, 432 F. Supp. at 1157.
120 *Germany v. Vance,* 868 F.2d 9, 16 (1st Cir. 1989) (citing *In re Gault,* 387 U.S. 1, 12–14 (1967)); *Schall v. Martin,* 467 U.S. 253, 263 (1984) (reviewing the basic constitutional protections that apply to juveniles accused of crimes).
121 *John L. v. Adams,* 969 F.2d 228, 233 (6th Cir. 1992).
122 *Id.* at 233 n.4 (citing *Morrow v. Harwell,* 768 F.2d 619 (5th Cir. 1985); *Leeds v. Watson,* 630 F.2d 674 (9th Cir. 1980); *Matzker v. Herr,* 748 F.2d 1142 (7th Cir. 1984)); *see also Penland v. Warren County Jail,* 797 F.2d 332, 335 (6th Cir. 1986) (Jones, J., concurring); *Ward v. Kort,* 762 F.2d 856 (10th Cir. 1985); *Johnson v. Brelje,* 701 F.2d 1201 (7th Cir. 1983).
123 *See Johnson v. Avery,* 393 U.S. 483, 490 (1969); *Wolff v. McDonnell,* 418 U.S. 539 (1974); *Bounds*, 430 U.S. 817.
124 *Bounds*, 430 U.S. at 822; *Patterson v. Mintzes,* 717 F.2d 284, 288 (6th Cir. 1983).
125 *Bounds*, 430 U.S. at 830-31.
126 La. Const. art. I, § 20.

In *State ex. rel. S.D.,* the Louisiana Court of Appeals for the Fourth Circuit found that the state violated a juvenile's right to treatment under the Fourteenth Amendment to the Constitution of the United States and Article I, § 2 and Article V, § 19 of the Louisiana Constitution while the child was maintained in the custody of one of the Department of Corrections' state juvenile facilities.[127] The court found that the State failed to provide S.D. with "the necessary care, treatment and counseling to meet [his] identified needs regarding substance abuse counseling, counseling for victim's (sic) of physical and sexual abuse, remedial education and vocational training services, and his need for ongoing psychiatric care."[128]

"The Due Process Clause of the Fourteenth Amendment to the United States Constitution 'requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.'" [129] "[F]ederal courts have repeatedly held that where 'the purpose of incarcerating juveniles in a state training school is treatment and rehabilitation, due process requires that the conditions and programs at the school must be reasonably related to that purpose.'" [130]

VII. WAIVER OF CONSTITUTIONAL RIGHTS

A. Waiver of the Right to Counsel

In *Johnson v. Zerbst,* the United States Supreme Court said waiver is the "intentional relinquishment or abandonment of a known right."[131] In order for an accused to validly waive the assistance of counsel, the waiver must happen voluntarily, knowingly and intelligently.[132]

"The purpose of the...right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights."[133] Without a substantive *Zerbst* inquiry into the circumstances surrounding a waiver of counsel, valid waiver cannot be found.[134] Whether a juvenile has made a knowing and voluntary waiver of the right to counsel is determined by the trial court under the totality of the circumstances.[135] The "totality" standard, particularly for youth, requires a

127 *State ex. rel. S.D.,* 02-0672 (La. App. 4th Cir. 11/06/02); 832 So.2d 415; U.S. Const. amend. XIV; La. Const. art. I, § 2; La. Const. art. V, § 19.
128 *State ex. rel. S.D.,* 832 So.2d at 436.
129 *State ex. rel. S.D.,* 832 So.2d at 433 (quoting *Jackson v. Indiana,* 406 U.S. 715, 738 (1972)).
130 *State ex. rel. S.D,* 832 So.2d at 433-34 (quoting *Morgan v. Sproat,* 432 F. Supp. 1130, 1135 (S.D. Miss. 1977)); *see also Alexander S. v. Boyd,* 876 F. Supp. 773, 796 (D.S.C. 1995).
131 *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938).
132 *Zerbst,* 304 U.S. at 464.
133 *Zerbst,* 304 U.S. at 464 (1938); *Moore v. Michigan,* 355 U.S. 155, 161 (1957).
134 *Wilkins v. Bowersox,* 933 F. Supp. 1496, 1509 (W.D. Mo. 1996) (on remand from 8th Cir.).
135 *Fare v. Michael C.,* 442 U.S. 707 (1979); *see also United States v. John Doe,* 170 F. 3d 1162, 1166 (9th Cir. 1999) (citing *In re Gault,* 387 U.S. 1 (1967); *Haley v. Ohio,* 332 U.S. 596 (1948)) (The federal government erred because parental notification of a juvenile's Miranda rights must be given contemporaneously with the notification of custody in order to comply with 42 U.S.C. § 5033 (2000), but the error was harmless given the totality of the circumstances.).

strong analysis of age, maturity, environment, prior contact with the system, presence or absence of a parent or interested adult and other factors enumerated within the case law.

The Louisiana Children's Code allows a child or youth to waive the right to counsel only if *all* of the following exist:

> 1) The child has consulted with an attorney or other adult interested in the child's welfare.
>
> 2) That both the child and the adult advisor have been instructed by the court about the child's rights and the possible consequences of waiver.
>
> 3) That the child is competent and voluntarily waiving his right to counsel.[136]

However, a child may not waive counsel if it has been recommended to the court that the child be placed in a mental hospital, psychiatric unit or substance abuse facility, if the child is charged with a felony-grade delinquent act, or if the proceeding is a probation or parole revocation hearing.[137] The waiver of counsel may be accepted at any stage in the proceedings. The waiver must be in writing, reciting the three requirements listed above and must be signed by the child and his attorney or other interested adult and filed in the record.[138] If there is a conflict between the adult advisor and the child, the court shall appoint an attorney to represent the child. The court must also appoint an attorney if required in the interests of justice.[139]

B. Waiver of Counsel—Interrogation

The standard for the waiver of the Fifth Amendment right to counsel during an interrogation is whether or not the defendant requested counsel at interrogation or was already represented at trial.[140] To obtain valid waiver during a post-indictment interrogation, the judicial officer is required to explain the content and significance of the Sixth Amendment right to counsel.[141]

"Under the federal constitution, the determination of whether a juvenile's incriminating statements are admissible, as based on a knowing and voluntary waiver of the right against self-incrimination and the right to assistance of counsel, is made on the totality of the circumstances surrounding the interrogation."[142] "The totality of the circumstances approach mandates inquiry into *all the circumstances* surrounding the interrogation, including evaluation of the juvenile's:"[143]

136 La. Child. Code Ann. art. 810 (2006).
137 La. Child. Code Ann. art. 810(D) (2006).
138 La. Child. Code Ann. art. 810(B) (2006).
139 La. Child. Code Ann. art. 810(C) (2006).
140 *See United States v. Mohabir,* 624 F.2d 1140 (2d Cir. 1980).
141 *Mohabir*, 624 F. 2d 1140, 1153; *see also Felder v. McCotter,* 765 F. 2d 1245, 1249-50 (5th Cir. 1985) (holding that Miranda warnings are insufficient to obtain a voluntary, knowing and intelligent waiver of Sixth Amendment rights, when counsel had requested that police not speak to his client without client's presence).
142 *State v. Fernandez,* 96-2719 (La. 04/14/98); 712 So.2d 485, 487 (1998) (citing *Fare v. Michael C.,* 442 U.S. 707 (1979); *Gallegos v. Colorado,* 370 U.S. 49 (1962)).
143 *Fernandez*, 712 So.2d at 486 (citing *Fare v. Michael C.,* 442 U.S. 707 (1979) (emphasis added)).

- Age,
- Experience,
- Education,
- Background,
- Intelligence,
- Capacity to understand the warnings given him,
- Capacity to understand the nature of his Fifth Amendment rights, and
- Capacity to understand the consequences of waiving those rights.[144]

In *State v. Fernandez,* the Louisiana Supreme Court held that "a confession by a juvenile given without a knowing and voluntary waiver can be, and should be, suppressed under the totality of circumstances standard applicable to adults, supplemented by consideration of other very significant factors relevant to the juvenile status of the accused."[145]

C. Waiver of Constitutional Rights: Adjudication, Confrontation, Self-Incrimination

"A valid guilty plea requires a showing that the defendant was informed of and waived his constitutional rights of trial by jury and confrontation, and the privilege against compulsory self-incrimination."[146] The due process principles of the United States Supreme Court case *Boykin v. Alabama,* which requires that a defendant be advised of his rights before entering of a plea, apply to juvenile delinquency proceedings.[147] "The juvenile must be advised of and waive his right to an adjudication hearing, to confront his accusers and his privilege against self-incrimination."[148] If a trial court fails to inform a defendant of his right to a jury trial, his right to confront his accusers and his privilege against self-incrimination, the plea does not meet the due process requirements of *Boykin*.[149]

In *In re Q.U.O.,* the Second Circuit Court of Appeals of Louisiana found:

> On close examination, we are constrained to agree with QUO's contention that "as the record indicates, the trial court failed to initiate any part of the *Boykinization* plea colloquy." Neither the transcript nor the minutes of the April 8 hearing show that QUO was formally advised of his rights under *Boykin*. Although he was actually represented by counsel at that and all other hearings, we cannot infer *Boykin* compliance from a

144 *Id.*
145 *Fernandez,* 712 So.2d at 486.
146 *In re Q.U.O.,* 39, 303 (La. App. 2d Cir. 10/27/04); 886 So.2d 1188, 1190 (citing *Boykin v. Alabama,* 395 U.S. 238 (1969); *State v. Montalban,* 00-2739 (La. 02/26/02); 810 So. 2d 1106 (cert. denied, 537 U.S. 887 (2002))).
147 *In re Q.U.O.,* 886 So.2d at 1190 (citing La. Child. Code Ann. art. 855; *In re J.G.*, 96-718 (La. App. 3d Cir. 12/11/96); 684 So. 2d 563).
148 *In re Q.U.O.,* 886 So.2d at 1190 (citing *In re Lucas,* 543 So. 2d 634 (La. App. 1st Cir. 1989)).
149 *In re J.G.,* 684 So.2d at 566 (citing *State v. Godejohn,* 425 So.2d 750 (La. 1983)).

> silent record. In the absence of such compliance, we must vacate QUO's admission, reverse the adjudication and disposition, and remand the case for further proceedings.[150]

In *State in Interest of J.G.,* the Second Circuit Court of Appeals of Louisiana invalidated a juvenile's guilty plea because the court did not inform her of her right against self-incrimination before she admitted to the charges in the petition.[151] The Second Circuit wrote:

> The trial court did not inform the juvenile of her right against self-incrimination at the above hearing. State Exhibit 3, introduced at the hearing on the juvenile's Motion to Withdraw Admission, is a waiver of rights form signed by the juvenile and her father on September 21, 1995, two weeks prior to the admission hearing. The form pertained to a statement given by the juvenile on September 21, 1995. The juvenile and her father signed the portion of the form informing the juvenile of her rights but not the portion waiving those rights. In that form, the juvenile was informed of her right to remain silent.
>
> At the admission hearing, Donna DeSoto, a Juvenile Services Officer, stated the juvenile changed her plea and indicated that she wanted to enter a plea of admission to the charge on September 21, 1995. However, no waiver of rights form was filed in the record at the admission to the charge proceeding. State Exhibit 3 does not cure the trial court's failure to inform the juvenile of her right to remain silent at the admission to the charge hearing since it was signed approximately two weeks before the admission hearing, and the juvenile did not sign the "Waiver of Rights" portion of the form.... Because the trial court failed to inform the juvenile of her right against self-incrimination, the juvenile's admission does not meet the due process requirements of Boykin, requiring the juvenile's admission be vacated, the adjudication and disposition be reversed, and the juvenile be permitted to plead anew.[152]

150 *In re Q.U.O.,* 886 So.2d at 1191.
151 *In re J.G.,* 684 So.2d at 566.
152 *Id.*

CHAPTER 6

SPECIAL EDUCATION ADVOCACY AND DELINQUENCY REPRESENTATION

A majority of children involved in the delinquency system also have education-related disabilities.[1] While approximately 7% of public school students in the United States have been identified as having disabilities, "[w]ithin the juvenile justice system...children and adolescents with disabilities are grossly overrepresented and are disproportionately detained and confined."[2] Utilizing special education rights and remedies in delinquency representation can often augment needed services for juvenile clients, prevent placements in juvenile facilities and can even result in the dismissal of delinquency charges.

This chapter aims to guide the reader through the various laws relating to special education rights, as well as substantive protections and rights of disabled children. Familiarity with these laws can assist with obtaining legally mandated services for clients that may alleviate the need for a child's involvement in the juvenile court system. In addition, children with disabilities may have enhanced rights within the juvenile court system itself, and juvenile defenders should be prepared to enforce those rights and demand appropriate and just treatment of clients with disabilities.

I. DETERMINING WHETHER YOUR CLIENT HAS A DISABILITY

While not all children charged with delinquent acts have disabilities, a large proportion of children involved in the juvenile court system suffer from disabilities that affect their ability to function in their schools and communities.[3] In fact, it is often a child's deficiencies caused by a disability that result in delinquent behaviors and activities in the first place. Being aware of any disabilities with which your client may be struggling is crucial in providing comprehensive defender services.

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1 Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA) for Children in the Juvenile Delinquency System 5 (Joseph B. Tulman & Joyce A. McGee, eds., Annie E. Casey Foundation Juvenile Detention Alternatives Initiative, spons., University of the District of Columbia School of Law Juvenile Law Clinic, 1998) [hereinafter "Tulman & McGee"].

2 Peter E. Leone et al., *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention,* 3 D.C. L. Rev. 389, 389 (1995).

3 Leone, *supra* note 2, at 389. "Studies and meta-analyses of disabling conditions among incarcerated juveniles estimate the prevalence rate at 12% to 70%." One study estimates that the percentage of youth with emotional disabilities is "at least three to five times greater in juvenile correctional facilities than in public schools." Tammy Seltzer et al., Bazelon Ctr. for Mental Health Law, *Suspending Disbelief: Moving Beyond Punishment to Promote Effective Interventions for Children with Mental or Emotional Disorders* 6 (2003) (citing Peter E. Leone & S. Meisel, *Improving education services for students in detention and confinement facilities,* 71 Child. Legal Rts. J. 1, 2-12 (1997)).

In preliminary interviews with your young client and his or her family, efforts should be made to determine whether the child suffers from any disabilities or has been designated as a special education student. Both the child and the parents or guardian should be questioned about specific diagnoses by the school or other professionals; whether the child receives social security benefits and, if so, for what; whether the child takes any medication; whether the child is enrolled in regular or special education classes at his or her school; whether the child receives additional tutoring; and whether the child struggles in school academically or behaviorally.

A. Acquiring Records

Efforts should also be made as soon as possible to obtain records from the parents, school, local school board and any other agencies which are determined, in the course of interviews and investigation, to possibly have records regarding the child's disability, special education history or mental health history. These records will be crucial both in advocacy in delinquency court and within the school system.

Educational records should include not only the child's grades and attendance records, but all disciplinary records, behavior plans, evaluations and, most importantly, current and past Individualized Education Programs (IEPs). The IEP is the document that should contain all of the goals, services, modifications and accommodations deemed necessary as a result of a designated special education student's exceptionality. "Excavating records from kindergarten and first grade through the child's current grade (or the grade in which the child left school altogether) often unearths a startling pattern of educational neglect, including a failure to diagnose and address learning disabilities or other education-related disabilities, and a corresponding pervasive, punitive, and essentially illegal application of school discipline sanctions."[4]

Although parents are supposed to receive copies of IEPs and other education-related documents, schools do not always provide them as they should, and parents do not always keep the records they receive. These records can be obtained by making requests to the school district's department of special education and to the school itself. Records can be obtained as long as the request is accompanied by an authorization of release of information which complies with state and local regulations regarding information-sharing. For records from a school district, a general authorization form signed by the parent or legal guardian should be sufficient to fulfill this purpose. Records can also be obtained through an official *subpoena duces tecum* or court order through the juvenile court.

The title of the person in charge of gathering these records will vary from school to school. For example, in some schools, the IEP or caseload teacher might be assigned this responsibility; in others, it could be the school counselor or social worker. To expedite the process, you should call the school prior to sending the request, so you

4 Tulman & McGee, *supra* note 1, at 4-2.

can address it to a specific person. Do not assume that simply sending or faxing a letter will result in records being mailed to you a few days later. Call frequently and ask to speak with the person in charge of collecting the records until the records have been received or are ready for pickup. While the Individuals with Disabilities Education Act (IDEA) and Exceptional Children's Educational Act (ECEA) both guarantee a parent access to their child's educational records,[5] many schools and districts charge an administrative fee for making and distributing the copies. Such a fee is permissible and will vary from school to school and from district to district.

Records requests to hospitals and mental health facilities must be accompanied by authorizations for release of information signed by a parent or guardian that comport with federal Health Insurance Portability and Accountability Act ("HIPPA") requirements.[6] Even a court order or subpoena cannot overcome the stringent HIPPA requirements due to the importance placed on the confidentiality of medical records. It may be best to contact the hospital or mental health facility in advance to obtain their approved authorization forms or to inquire about their process to facilitate ease of acquiring documents. A sample authorization form that generally complies with current HIPPA requirements can be reviewed in the Appendix of this manual.

B. Common Disabling Conditions

Juvenile defenders should be familiar with disabling conditions common among children, so they can more easily identify those conditions among their clients and have a better understanding of their client's challenges and corresponding rights. Following is a brief description of some of the most common education-related disabilities that may affect a child's ability to participate in educational services and may affect their involvement with the juvenile court system.

1. Learning Disabilities

Learning disabilities are "disorders in one or more of the basic psychological processes involved in understanding or using spoken or written language."[7] Learning disabilities may be evident in "difficulties associated with listening, thinking, speaking, reading, writing, or doing mathematical equations."[8] "Other behaviors...associated with learning disabilities include poor judgment, poor adjustment to change, the need for immediate gratification, [and] an inability to listen or remember well, set realistic goals, and/or develop meaningful social relationships."[9]

5 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 502.A (2004) ("Parents of a student with a disability shall be afforded... an opportunity to inspect and review all educational records with respect to the identification, evaluation and educational placement of the student and with respect to the provision of a FAPE to the student.").

6 Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 104 Stat. 1996.

7 Leone, *supra* note 2, at 392.

8 *Id.*

9 *Id.* at 393.

2. Emotional or Behavioral Disorders

"Emotional or behavioral disorders can be described as disabilities characterized by behavioral or emotional responses so different from age, cultural, or ethnic norms that seriously effect an adolescent's academic and social skill development and critically inhibit effective responses to environmental stressors."[10] This type of disorder is "often chronic and intense in nature and can include conditions such as depression, anxiety, aggression, schizophrenia, and personality disorders."[11]

3. Mental Disability/Mental Retardation

"Mental retardation is characterized by intellectual functioning that is significantly below average, combined with adaptive behavior deficits...which originate in early childhood and adversely affect educational performance."[12] "The Intelligence Quotient (IQ) of a typical child ranges between 85–115, while the IQ of a child considered to have mental retardation falls in the range of 50–70."[13] Children challenged with mental retardation "may exhibit a negative self-image, irrational fears which result in behavioral disturbances, and/or depression."[14] Although "mental retardation" is the more commonly known term for below-average intellectual functioning and its accompanying problems, the Louisiana Department of Education recognizes only the exceptionality of "mental disability," and specifically defines the criteria for classifying a child as mentally disabled.[15] The IEP Handbook divides the exceptionality of mental disability into four categories—Mildly Impaired, Moderately Impaired, Severely Impaired and Profoundly Impaired.[16] Also, it is important to note that before classifying the child as mentally disabled, it must be ruled out that the learning problems are not a result of other factors unrelated to the child's intellectual capacity.[17]

4. Other Health Impairment

Another disability category is Other Health Impairment ("OHI"). With regard to this classification, the Louisiana Pupil Appraisal Handbook states the following:

> *Other Health Impairment* means having limited strength, vitality, or alertness—including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment

10 *Id.; see also The Louisiana Pupil Appraisal Handbook,* Bulletin 1508, p. 46. La. Admin. Code tit. 28, Part CI (2004). This handbook describes the criteria a child must meet in order to be classified with a particular disability.
11 Leone, *supra* note 2, at 393.
12 *Id.*
13 *Id.*
14 *Id.*
15 Bulletin 1508, *supra* note 10, at 21–22.
16 *Id.* at 22. The categories are based on different ranges of measured intelligence with mild impairment designated for those students two to three standard deviations below the mean, moderate impairment for those three to four standard deviations below the mean, severe impairment for those four to five standard deviations below the mean, and profound impairment for students more than five standard deviations below the mean.
17 *Id.* at 22. Factors unrelated to intellectual capacity that could result in scores within the mentally disabled range include: other disabling conditions, lack of educational opportunity, emotional stress in the home or school, difficulty adjusting to school, curricular change, a temporary crisis situation, environment, cultural differences or economic disadvantage.

> that is due to chronic or acute health problems—and may include such conditions as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, diabetes, attention deficit hyperactivity disorder, or attention deficit disorders; and adversely affects a student's educational performance.[18]

Any client with a medical diagnosis of ADD (Attention Deficit Disorder) or ADHD (Attention Deficit Hyperactivity Disorder) who is exhibiting significant behavior problems could be a good candidate for this classification.

Many children challenged with disabilities have a tendency to exhibit behaviors that may lead to their involvement with the juvenile justice system and which may result, without effective advocacy, in harsher treatment within the system. "Youths with disabilities may appear uncooperative, disrespectful, angry,...irritable," aggressive or apathetic, resulting in negative responses from court personnel.[19] It is the job of the juvenile defender to be familiar with each client's disabilities and the effects thereof on behavior so as to educate the court and, therefore, promote a process which is appropriate for the child given his or her abilities.

II. LEGAL PROTECTIONS FOR CHILDREN WITH DISABILITIES

In just over 30 years, special education has gone from a virtually unregulated service area left to the whim of each school district to a field of law in its own right. Today, this still evolving sphere of legal practice is dominated by a single comprehensive federal statute, the Individuals with Disabilities Education Act ("IDEA")[20] and its accompanying regulations.[21] In addition, many states, such as Louisiana, have their own special education statutes and regulations which act as a more detailed counterpart to the broader federal law.[22] Together, these statutes, regulations and the case law built around them are important tools for ensuring that all disabled students in Louisiana receive a Free Appropriate Public Education ("FAPE").

A. Sources of Laws Protecting the Rights of Children with Disabilities

1. Individuals with Disabilities Education Act (IDEA)

IDEA is a federal regulation, adopted by every state, which provides that a child with a disability is entitled to educational services, as well as related services and transition services.[23] The most recent reauthorization of the IDEA, the Individuals with Disabilities Education Improvement Act, went into effect on July 1, 2005. The

18 *Id.* at 24.
19 Leone, *supra* note 2, at 394.
20 Individuals with Disabilities Education Act, 20 U.S.C. •1400 *et seq.* (2005).
21 34 C.F.R. § 300 *et seq.* (2005).
22 *See* Education of Children with Exceptionalities Act, La. Rev. Stat. Ann. § 17:1941 *et seq.* (2006).
23 Individuals with Disabilities Education Act, 20 U.S.C. •1400 *et seq.* (2005).

Code of Federal Regulations provides detailed interpretations of the IDEA's requirements,[24] and was recently updated to reflect the changes implemented by the Individuals with Disabilities Education Improvement Act. These new regulations went into effect on October 13, 2006.

The purposes of IDEA are:

> 1) (A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;
>
> (B) to ensure that the rights of children with disabilities and parents of such children are protected; and
>
> (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;
>
> 2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;
>
> 3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and
>
> 4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.[25]

2. State Laws and Regulations

Louisiana's Education of Children with Exceptionalities Act ("ECEA") is the State counterpart to the IDEA.[26] Much of the language contained in the ECEA is borrowed directly from the IDEA. Furthermore, the ECEA's implementing regulations contained in the Louisiana Department of Education's Bulletin 1706 provide a number of more detailed obligations that Local Education Agencies ("LEAs"), i.e., school districts, must follow.[27] Again, the state regulations have not been changed to reflect the amendments made to the IDEA in 2004.

Other state regulations which might be useful to lawyers advocating for special education clients are contained within the Pupil Appraisal Handbook,[28] the Extended

24 34 C.F.R. § 300 *et seq.* (2006).
25 20 U.S.C. •1400(d) (2005).
26 Education of Children with Exceptionalities Act, La. Rev. Stat. Ann. § 17:1941 *et seq.* (2006).
27 Bulletin 1706, La. Admin. Code tit. 28, Part LVII (2004).
28 Bulletin 1508, *supra* note 10. This handbook describes the criteria a child must meet in order to be classified with a particular disability.

School Year Program ("ESYP") Handbook[29] and the Individual Educational Plan Handbook for Students with Disabilities.[30] The relevant sections of these laws and regulations will be indicated as they arise throughout the chapter.

3. School District Codes of Conduct and Student Handbooks

Each school district develops its own code of conduct and/or student handbook, which further delineates policies to which school officials must adhere. These lesser known district policies are frequently more favorable to special education students than federal or state regulations, but they are often poorly implemented. Generally, these documents also detail the mechanisms established to challenge disciplinary actions for both regular and special education students. Parents should be given copies of these policies at the beginning of every year but these documents are also available at the school district's central office. Juvenile defenders should make a practice of keeping an up-to-date copy of such materials in their libraries for ease of reference.

4. Other Federal Sources

A number of other sources of law which are more general in nature also offer protection to children with disabilities and can be raised in special education disputes. For example, the American with Disabilities Act ("ADA")[31] and Section 504 of the Rehabilitation Act[32] both contain provisions requiring that people with disabilities be granted the same access to public programs as those without disabilities. In addition to these statutes, the Fourteenth Amendment of the United States Constitution also prohibits discrimination against individuals with disabilities through the Equal Protection Clause.[33]

B. Substantive Protections for a Free and Appropriate Public Education

Under the IDEA and related federal and state regulations, children with disabilities are entitled to a free and appropriate public education (FAPE). More specifically, disabled children are entitled to educational benefit, related services, educational services in the least restrictive environment and transition services. Following is an overview of these substantive rights.

1. Educational Benefit

In *Board of Education v. Rowley,* the Supreme Court of the United States established that a child's individual education program (IEP) must be "reasonably calculated to enable the child to receive educational benefits."[34] The United States Court of Appeals for the Fifth Circuit has recognized the *Rowley* standard stating that a free

29 Bulletin 1872, La. Admin. Code tit. 28, Part LVII (2004).
30 Bulletin 1530, La. Admin. Code tit. 28, Part XCVII (2004).
31 Americans with Disabilities Act, 42 U.S.C. § 12101 (2005).
32 29 U.S.C. § 791 *et seq.* (2005).
33 U.S. Const. amend. XIV, § 1.
34 *See Bd. of Educ. v. Rowley,* 458 U.S. 176, 207 (1982).

and appropriate public education entails the provision of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.... In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and...should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."[35]

In another decision, the Fifth Circuit set forth four factors that should be used to determine if an IEP is reasonably calculated to produce educational benefit: "(1) The program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders'; and (4) positive academic and non-academic benefits are demonstrated."[36] Therefore, the standard for determining if there has been a violation of the right to an opportunity for educational benefit is both procedural and results-oriented.

The minimum acceptable results or level of academic achievement will vary from child to child depending on individual mental capabilities and a host of other factors. Nevertheless, the mandate to use "peer-reviewed research to the extent practicable"[37] in developing IEPs for special education and related services should prevent school districts from using outdated or ineffective teaching methods. Furthermore, a school district would be hard pressed to argue that a FAPE is being provided if a child who is of average intelligence with a relatively common exceptionality is years behind his or her peers. Particularly with children whose only exceptionality is an emotional or behavioral disorder, there is almost no excuse for academic performance levels that are years behind chronological age standards.

2. Related Services

The IDEA defines "related services" as:

> [T]ransportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with

35 *White v. Ascension Parish School Board,* 343 F.3d 373, 378 (5th Cir. 2003) (quoting *Bd. of Educ. v. Rowley,* 458 U.S. at 203-04).
36 *Adam J. v. Keller Indep. Sch. Dist.,* 328 F.3d 804, 810 (5th Cir. 2003) (citing *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.,* 118 F.3d 245, 253 (5th Cir. 1997)).
37 34 C.F.R. § 300.320 (2006).

> a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.[38]

This non-exhaustive list of services, which local education agencies must provide as a part of a FAPE, is indicative of the broad interpretation intended for the term "related services" under the IDEA. Anything short of non-diagnostic medical services can be considered a related service. However, the problem is not always determining whether a particular service falls under the category of related services. More likely, the challenge will be convincing the IEP team members that a particular related service is necessary in a particular case. For example, school officials may agree that your client is entitled to social work services, but only offer a 30-minute session once a month. In a dispute over the frequency or intensity of a particular related service, advocates should rely on common sense and best practices to support arguments for increasing a related service. Should the dispute rise to the level of a due process hearing, testimony or written recommendations from outside service providers and experts will prove helpful in overcoming the recommendations of the district's own experts.

3. Least Restrictive Environment

Students with exceptionalities are entitled to be educated in the *least restrictive environment* possible. The IDEA states that:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."[39]

Given vague phrasing such as "to the maximum extent appropriate" and "achieved satisfactorily," it appears that the federal statute does not offer much protection at all. However, state regulations and Fifth Circuit jurisprudence further define and expand upon the IDEA requirements for educating disabled students in the least restrictive environment. The Regulations for Implementation of the Children with Exceptionalities Act elaborate upon the least restrictive environment obligation by stating that "[r]easons for selecting a more restrictive environment may not be based solely on category of disability, severity of disability, availability of educational or related services, administrative convenience or special equipment."[40] Moreover, the Fifth Circuit has outlined a two-pronged analysis, based on *Daniel R.R. v. State Board of Education,*[41] for determining if a district is complying with IDEA standards for

38 20 U.S.C. § 1401(26)(A) (2005).
39 20 U.S.C. § 1412(a)(5)(A) (2005).
40 La. Admin. Code tit. 28, Part XLIII, § 446(6) (2004).
41 874 F.2d 1036, 1048 (5th Cir. 1989).

educating disabled students in the least restrictive environment. Under this analysis, one should ask:

> "[W]hether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child," and if not, "whether the school has mainstreamed the child to the maximum extent appropriate." To decide the first question, [one should] consider whether the district "has taken steps to accommodate the handicapped child in regular education." [One should] consider whether the efforts to accommodate the disabled student are sufficient, bearing in mind that "the Act does not require regular education instructors to devote most of their time to one handicapped child or to modify the regular education program beyond recognition."[42]

In *Daniel R.R.*, the Fifth Circuit articulated specific guidelines for determining least restrictive environment compliance by analyzing a series of questions in reaching their decision. First, the court asked "whether the state has taken steps to accommodate the handicapped child in regular education."[43] Next, the court examined "whether the child will receive an educational benefit from regular education."[44] The court then stated "[w]e also must examine the child's overall educational experience in the mainstreamed environment, balancing the benefits of regular and special education for each individual child."[45] At several points, the court emphasized that "academic achievement is not the only purpose of mainstreaming."[46] In other words, simply being with non-disabled peers can in and of itself greatly benefit a child with an exceptionality. For example, the exposure to appropriate verbal or behavior patterns in a regular education setting may benefit a disabled child in such a manner that would outweigh the added academic difficulty of being placed in that setting. Finally, the Court analyzed the effect of the disabled child on the regular classroom environment.[47] These factors indicate a balancing approach to determining least restrictive environment that takes into account the wider context for each child on a case-by-case basis.

Given this balancing approach, only in extreme cases should a child spend all or most of his or her school day in a special education setting. Too often, school districts take an all-or-nothing approach to the educational placement of their students with exceptionalities. Some students are unnecessarily placed in self-contained settings with little or no access to their non-disabled peers the entire day. Others are thrust into regular education classes without the supports necessary to succeed academically or socially. The ideal situation would be to have every disabled child educated

42 *Brillon v. Klein Indep. Sch. Dist.*, 100 Fed. App'x 309, 312 (5th Cir. 2004) (citations omitted) (quoting *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989)).
43 *Daniel R.R.*, 874 F.2d at 1048.
44 *Id.* at 1049.
45 *Id.*
46 *Id.*
47 *Id.*

along with his or her non-disabled peers, but with the services and supports needed to succeed. In the event that this is not possible in a regular education setting, educating a disabled child in special education classes is acceptable. However, the time spent in special education-only classes should be as limited as possible and should have the goal of helping the child to overcome an exceptionality so that full inclusion is possible in the future. For this reason, the regulations establish that school districts must make available a continuum of placements available to disabled students and specify that the IEP team can only select a more restrictive setting if the less restrictive options have been considered and discarded.[48] The placements on the continuum must include full inclusion on one end, with a self-contained setting and special schools on the other end of the spectrum. In between these extremes exist several options, including the option of spending most of the day in a regular classroom setting, with one or two special education classes to provide extra help in needed areas such as behavior modification or a particular academic subject. If a child with behavior problems has been in a self-contained setting for several years and behavior and academic performance have not improved, this is a red flag that the child is not receiving the appropriate services to help him or her overcome the exceptionality, and that he or she is in too restrictive a setting.

An important tool for ensuring placement in the least restrictive setting is procedural in nature. State regulations require that a re-evaluation be completed prior to any move to a more restrictive setting.[49] This clause essentially gives parents the power to veto a move to a more restrictive setting, since parental consent must be given for a re-evaluation. As a result, the school will oftentimes leave the child in the less restrictive setting and implement the appropriate supports rather than face the costly and uncertain prospects of a due process hearing. Also, these procedural protections are taken so seriously that not even the child's parent can waive the requirements pertaining to least restrictive environment.[50] Although the school district retains some discretion in determining the appropriate setting with regard to least restrictive environment, the standards laid out in case law and the procedural protections contained in the regulations provide enough support to make least restrictive environment a meaningful protection for disabled students.

4. Transition Services

The Federal regulations for the IDEA define "transition services" as:

> (a) ...a coordinated set of activities for a student with a disability that—

48 Bulletin 1530, Louisiana's IEP Handbook for Students with Disabilities, La. Admin. Code tit. 28, Part XCVII, § 307(B)(3) (2004).

49 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 448(B) (2004) ("*Significant change in educational placement* is defined as moving a student from one alternative setting to another that is more restrictive or which transfers jurisdiction; such a change requires a re-evaluation.")

50 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 446(A)(11) (2004) ("The Least Restrictive Environment rules shall not be waived by any party, including the parent(s).").

1) Is designed within an outcome-oriented process, which promotes movement from school to post-school activities, including postsecondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(2) Is based on the individual student's needs, taking into account the student's preferences and interests; and

(3) Includes—

(i) Instruction;

(ii) Related services;

(iii) Community experiences;

(iv) The development of employment and other post-school adult living objectives; and

(v) If appropriate, acquisition of daily living skills and functional vocational evaluation.

(b) Transition services for students with disabilities may be special education, if provided as specially designed instruction, or related services, if required to assist a student with a disability to benefit from special education.[51]

According to the IDEA, all IEPs that will be in effect when a child is 16 or older must contain "appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills" as well as "the transition services (including courses of study) needed to assist the child in reaching those goals."[52] One important change in the IDEA in 2005 was that local education agencies are no longer required to begin transition planning at the age of 14. Nevertheless, the transition planning beginning at age 14 or at an even younger age if appropriate is still required by the State regulations.[53] The provision of transitional services is particularly important when a child at 16 is already so far behind that he or she has very little chance of graduating with a regular diploma by the time special education eligibility runs out. Many districts have vocational schools from which children can graduate with a license to practice a trade such as welding, cosmetology, masonry, etc.

51 34 C.F.R. § 300.29 (2006).
52 20 U.S.C. •1414(d)(1)(A)(i)(VIII) (2005).
53 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 441(M)(1) (2004).

III. SPECIAL EDUCATION ADVOCACY

The services and accommodations which school districts are required to provide children under the IDEA can be a valuable resource for juvenile defenders seeking to develop and promote effective alternatives to incarceration and detention for their clients.[54] As advocates struggle to find sufficient services to allow their juvenile clients to remain in their communities, they should be mindful that schools are one of the few community institutions with the sufficient infrastructure and resources, not to mention a federal mandate, to provide supports to children with disabilities. Although school-based services alone may not be enough to keep a child out of the juvenile justice system, together with outside services these supports can be an essential source of reinforcement for a behaviorally challenged child.

A. Special Considerations When Providing Special Education Advocacy to a Delinquency Client

When determining whether to represent a child in special education-related matters, it is important to consider that, in such representation, the parent or guardian becomes the client. Advocacy for special education rights within the school system is advocacy for the parent and the child, thus altering the relationship of the juvenile defender and the client. It is crucial to explain the ramifications of this to the client and her parent and to obtain the consent of both, in writing, before endeavoring to take on such representation. If the child does not agree, the parent may take action on behalf of their child even without the child's consent, but as counsel for the child, you should not be involved in such advocacy against the wishes of your client.

If you are not in a position to provide special education advocacy within the school system because of excessive caseloads or because of an anticipated conflict between your client and her parents, it may be worthwhile to refer the family to another attorney who can handle the special education matters. Federal regulations provide for attorney's fees for counsel representing youth in special education matters and this may provide an incentive to private attorneys to become involved in such cases. In addition, alliances with public interest law groups or local law schools, if available, could result in an arrangement for the provision of special education advocacy to delinquency clients. Parents can also advocate on behalf of their children *pro se*. If the child approves, you can provide advice and consultation to the parent and encourage him throughout the process.

If the client approves and you endeavor to provide special education advocacy, the following guidelines may assist you in preparation:

Steps to Special Education Advocacy for a Delinquency Client

Counsel should:

54 One study estimates that the percentage of youth with emotional disabilities is "at least three to five times greater in juvenile correctional facilities than in public schools." Seltzer, *Suspending Disbelief*, *supra* note 3, at 6 (citing Peter E. Leone & S. Meisel, *Improving education services for students in detention and confinement facilities,* 71 Child. Legal Rts. J. 1, 2-12 (1997)).

1) Discuss with the child advantages and disadvantages of employing a special education strategy within the delinquency case. Counsel also should discuss with the child the need to engage a "parent" as a client also for purposes of the special education representation. (If the child is 18, counsel should discuss with the child the choice of representing the child alone in the special education matter.)

2) Execute a retainer agreement with the client(s) and obtain from the parent and the child a release form to facilitate collection of records, etc.

3) Have extensive discussions with the client(s) to determine, at least preliminarily, the goals of the client in terms of education and (for the child) in terms of the delinquency case.

4) Obtain all relevant educational, medical, psychological records and evaluations. Counsel should investigate the child's educational, medical, and social history.

5) Chart the child's educational history, literally creating a chart that organizes the information by year, grade-in-school, school attended, grades on report cards, scores on achievement tests, evidence of special education actions (including referrals for evaluation), etc. In essence, counsel must think of every possible category to include in the chart.

6) Based upon relevant special education legal provisions, identify the rights and legal theories that advance the educational and delinquency case goals of the client(s).[55]

B. Identifying a Child for Special Education Services

Children in Louisiana are eligible to receive special education services from the time they are three years old until the end of the school year in which they turn 22.[56] Until a child has been classified by the school district as disabled via an individual evaluation, she will generally not be eligible for the services and protections offered by the IDEA and other special education laws.[57] Furthermore, a good evaluation is important not only because it determines eligibility for special education services, but also because it determines the specific educational needs of a child and can be utilized in juvenile court to advocate for appropriate services.[58] The needs established by an individual evaluation are the basis for the services, modifications and accommodations which will be included in the child's Individual Educational Plan (IEP).

55 Tulman & McGee, *supra* note 1, at 2-19.
56 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 401(E) (2004).
57 34 C.F.R. § 300.306 *et seq.* One important exception to this rule is that while a child is being evaluated, most of the procedural protections related to discipline still apply as if the child had already been classified disabled. 34 C.F.R. § 300.504.
58 20 U.S.C. •1414(b)(2)(A).

1. Requesting an Evaluation

If a client has not been designated as a special education student by the school system, a request for an evaluation will have to be made in order to determine a child's eligibility for such services. The decision to have a child evaluated for special education services is not one that should be made lightly. Despite the legal protections offered by such a classification, the reality is that many districts do a poor job of educating special education students, and that being designated as "disabled" still often leads to labeling and stigma that can result in more harm to a child than good. As an advocate, you should be conscious of the fact that the label will more than likely follow the child throughout his or her educational career, and that the child might not always have legal representation to help resolve disputes. The client and her parents should be counseled on the possible negative and positive implications of raising special education issues within the school system.

In the event that the client and parent or guardian opt in favor of a special education evaluation, the request should be made in writing to both the school site and to the district's special education office. In theory, the request could be made only to the school site; however, school officials at the central office's department of special education are more likely to know the rules regarding timelines and other procedural safeguards, making a request here more likely to be answered in a timely and proper manner. According to state regulations, formal parental approval must be requested within "ten business days from the date of receipt of the referral for an individual evaluation of an identified student by pupil appraisal."[59] In turn, the evaluation must be completed and disseminated "within sixty business days of receipt of parental approval."[60] Certain extensions can be granted if, for example, the summer break interrupts the testing required for the evaluation.

An evaluation is meant to assess a student's needs and determine his or her classification through a broad range of tests aimed at discovering any potential or suspected physical, mental or emotional disabilities. With regard to methodology, the team conducting the evaluation should:

> (A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining:
>
> (i) whether the child is a child with a disability; and
>
> (ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

59 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 436(A) (2004).
60 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 436(B) (2004).

(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.[61]

2. Independent Evaluations

If the parent or guardian is unhappy with the results of the evaluation, it is possible to obtain an Independent Educational Evaluation ("IEE") at the expense of the school district.[62] Again, since the basis of the IEP will be the needs determined by the evaluation, having a thorough and accurate evaluation is extremely important. If the disabled child already has an IEE or any other medical or psychological assessment performed by an outside agency, then the school district must consider these in making its final decision as to eligibility and needs related to special education.

C. IEP Meetings

Many of the disputes involving services for a special education child can be resolved at the level of the Individualized Education Program (IEP) meeting. The purpose of the IEP meeting is to develop a comprehensive document which addresses all of the educational and related needs of a disabled child. These meetings must be held once a year for children designated for special education services, but can be called by a parent at any time. An IEP meeting can be called for a specific purpose and can function as a negotiation session for acquiring a particular service or accommodation needed by a client. More often, IEP meetings are held as a once-a-year review in which the child's entire educational program is reexamined. Whether called for a specific purpose or as part of the routine annual revision, an IEP meeting can result in minor changes or major adjustments to a child's educational program.

An IEP meeting should be as inclusive as possible to ensure that all parties who could contribute to the formulation of an appropriate educational program for a child are present and should always include at least one parent or guardian. The parent's right to participate includes a right to be notified in advance of the purpose, date, time and location of the IEP meeting as well as to be notified of who will be in attendance.[63] At a minimum, IEP team members should include: 1) one or both parents of the child or the child's guardian; 2) at least one regular education teacher; 3) at least one

61 20 U.S.C. •1414(b)(2).

62 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 503 (2004), provides that:
B. An IEE is provided at public expense to the parents if:
1. the parent disagrees with an evaluation provided by the LEA; or
2. a hearing officer requests an IEE as part of a due process hearing.
C. When an LEA is notified in writing by the parent that the parent disagrees with the LEA's educational evaluation, the LEA has 10 business days following the receipt of the notice to initiate a due process hearing to show that its evaluation is appropriate. If the LEA does not initiate a due process hearing within the 10 business days, the IEE shall be at public expense.

63 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 504(D) (2004).

special education teacher; 4) an officially designated representative of the school district knowledgeable about the resources of the school district; 5) any other person with knowledge or expertise about the child invited at the discretion of the parent or Local Education Agency; and 6) the child, when appropriate.[64] The actual number of people on an IEP team will vary, since not every category applies to every child, and since one person could fulfill several of the functions listed above.[65] It is almost always helpful to have service providers from outside agencies present, so there can be coordination of school and non-school services. The child should participate at the discretion of the parent or guardian for all or part of the meeting, keeping in mind the age and maturity of the child as well as the nature of the issues being discussed. Involvement in the IEP meeting by the juvenile defender's office, if possible, provides an excellent opportunity for advocacy to ensure that the child received the services to which he is entitled. Advocating for maximized services through the IEP process can also have a positive impact on juvenile court decisions regarding the need for detention, post-adjudication incarceration, probationary terms and even potentially dismissal.

D. Filing for a Due Process Hearing

When an issue cannot be resolved through the IEP process, an advocate or parent may file for a due process hearing to resolve a dispute over any matter dealing with the refusal or proposal to initiate or change a disabled child's identification, evaluation or placement as well as any matter relating to the provision of a Free and Appropriate Public Education ("FAPE") to the child.[66] In other words, the dispute can revolve around the inclusion of a particular service or modification in an IEP, the implementation of a modification or service already listed in the IEP but not being followed, or even cases in which the school refuses to grant a request for an IEP meeting.

In order to file for a due process hearing, the parent or attorney must send written notice to the Louisiana Department of Education.[67] The acceptable format of a due process hearing request can vary widely but is subject to the following minimum requirements:

> The written notice to the Department for a due process hearing shall include the student's name and address, the name of the school the student is attending, a description of the nature of the problem, of the child relating to the proposed or refused initiation or change, including facts relating to the problem, and a proposed resolution of the problem to the extent known and available to the person requesting the hearing.

64 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 441(A) (2004).
65 For example, a special education teacher can also be the district's officially designated representative.
66 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 507(A) (2004).
67 *Id.* However, •507(A)(2) of the Regulations states that parents who are illiterate in English or have a disability that prohibits production of a written statement may present a request for due process orally.

The Department must provide a model form to a parent to assist in filing a request for a due process hearing.[68]

Once the request is filed, the hearing officer must adhere to the following procedures and timelines:

1. The hearing officer shall contact all parties to schedule the hearing and then shall notify in writing all parties and the Department of the date, time and place of the hearing.

2. The hearing shall be conducted in accordance with guidelines developed by the Department.

3. At the request of either party, the hearing officer shall have the authority to subpoena persons to appear at the hearing.

4. A final hearing decision shall be reached and a copy of the decision mailed to each party not later than 45 days after the receipt of the request for the hearing.

5. A hearing officer may grant specific extensions of time beyond the prescribed time requirements at the request of either party. When an extension is granted, the hearing officer shall, on the day the decision is made to grant the extension, notify all parties and the Department in writing, stating the date, time, and location of the rescheduled hearing.

6. A decision made by the hearing officer shall be final unless an appeal is made by either party.[69]

In theory, a parent or lay advocate should be able to initiate and complete a due process hearing without the assistance of a lawyer. However, an attorney will certainly be representing the school district in such a hearing, and it will only benefit a child to have an attorney advocating for her interests. A due process hearing can be very trial-like, depending upon the style of the hearing officer. During the due process hearing, the following rules apply to both parties:

1) The hearing shall be conducted at a time and place reasonably convenient to the parent and the student involved.

2) Any party shall have the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of students with disabilities.

3) Any party to the hearing shall have the right to present evidence and to confront, cross-examine and compel the attendance of witnesses.

68 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 507(A)(1) (2004).
69 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 508(C) (2004).

4) Any party to the hearing shall have the right to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing.

5) At least five business days prior to a hearing, each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluation that the party intends to use at the hearing.

6) The hearing officer may bar any party that fails to comply with the above requirement from introducing the relevant evaluation or recommendations at the hearing without the consent of the other party.

7) Any party shall have the right to obtain a written or electronic, at the option of the parent, verbatim record of the hearing at no cost.

8) Any party to the hearing shall have the right to obtain written or, at the option of the parent, electronic findings of fact and decisions at no cost.[70]

Furthermore, an important procedural protection is that, with certain exceptions related to discipline, "during the pendency of any administrative or judicial proceeding regarding due process, the student involved shall remain in the current educational placement unless the parent and the [Local Education Agency] agree otherwise."[71] This clause is known as a "Stay-Put Provision" and protects against the school district unilaterally implementing a change to an IEP.

E. Judicial Review of a Due Process Hearing Decision

Should the hearing officer's decision not be favorable to your client, an appeal should be made directly to state or federal court.[72] Judicial intervention in a special education dispute is for the most part available only as a review of a due process hearing decision, since case law has established the exhaustion of administrative remedies as a requirement for jurisdiction.[73] Judicial review comes directly after a due process hearing and must be filed "within 90 days after notification of the decision or finding of the hearing officer is received by the aggrieved person, agency, or party."[74]

F. Mediation and Other Procedural Avenues

Another important procedural mechanism to keep in mind throughout the special education advocacy process is the availability of mediation. At any point either before or after filing for due process, a parent or advocate can offer to mediate with the school district over a dispute related to the identification, evaluation or placement of the student or related to the student's FAPE.[75] Although the school district

70 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 507(B) (2004).
71 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 514(A) (2004).
72 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 512(A) (2004).
73 *Gardner v. Caddo Parish Sch. Bd.*, 958 F.2d 108, 111 (5th Cir. 1992).
74 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 512(A) (2004).
75 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 506(B) (2004).

is not required to accept an offer of mediation, the costs of mediation are born by the Louisiana Department of Education,[76] making this an attractive alternative to the costs of conducting a due process hearing.

G. Remedies

The ultimate goal of both federal and state special education laws is to provide a FAPE to disabled students. As such, virtually any request made on behalf of a client is legitimate as long as the argument can be made that the particular service or accommodation is essential to the child's FAPE. For this reason, possessing good negotiating skills and being able to develop creative solutions are as important as knowing the law when it comes to advocating on behalf of a special education client.

The most appropriate remedy for an educational benefit violation is often compensatory education. This remedy can be implemented either through tutoring during the school year or through the provision of Extended School Year services or other educational services provided during the summer. Louisiana's Extended School Year Program ("ESYP") is designed to ensure that students with disabilities who meet certain criteria receive educational and related services "beyond the normal school year of the [Local Education Agency] and at no cost to the parents of the student."[77] ESYP is available not only as a remedy for a violation under educational benefit, but also as a standard service that should be available to any disabled child who requires this type of help in order to receive a free and appropriate public education. As a result, each child with an IEP should be screened for ESYP eligibility each year. However, in order to qualify, a student must meet very specific criteria established for one of several categories contained in the ESYP Handbook.[78] Nevertheless, these criteria are vague enough that school districts will often agree to ESYP for any child who has been denied educational benefit through the actions of the Local Education Agency.

Remedies can also include the provision of private related services such as counseling, transportation, physical therapy, speech/language therapy, occupational therapy and tutoring.[79] Attorneys should request that schools pay for these private services to ensure that their clients receive a FAPE, regardless of the economic situation of the school district. If the school falters on its federally mandated obligation to provide services to a disabled child, the school must compensate that child by providing the services through private agencies. Much of the litigation involving the IDEA and private services has centered on the remedy of reimbursement for private school tuition, which is available when the school district cannot or refuses to meet adequately the needs of a disabled student. In *Burlington v. Massachusetts Department of Education*, the United States Supreme Court held that the IDEA confers the

76 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 506(B)(5) (2004).
77 Bulletin1872, La. Admin. Code tit. 28, Part LVII, § 101(A) (2004).
78 *See* Bulletin 1872, La. Admin. Code tit. 28, Part LVII § 517 (2004). These categories include: Regression-Recoupment, Critical Point of Instruction, Self-Injurious Behavior, Employment, Transition, Excessive Absences and Late Entry.
79 Tulman & McGee, *supra* note 1, at 13-4.

power to order school authorities to reimburse parents for their expenditures on private special education if the public placement offered by the school system is inappropriate.[80]

"As a practical matter, attorneys representing children with disabilities should ensure that the child receives all the services which the student needs, regardless of whether the school has the public resources available or not."[81]

IV. ADVOCATING FOR A DISABLED CLIENT IN SCHOOL DISCIPLINE MATTERS

Discipline is one of the most highly regulated areas of special education law because of the excessive suspension and expulsion rates of exceptional students. The IDEA and both federal and state regulations have extensive sections dealing with the allowable duration of disciplinary removals of disabled students, as well as with the heightened procedural safeguards that must be implemented before and after a disabled child is suspended from school.

Advocacy on this level is crucial because many children involved in juvenile court will be required to attend school as a requirement of probation or parole. If the school suspends such a child, it could result in revocation of probation and detention or incarceration. Forcing the school to provide appropriate educational services in such a situation can result in keeping a child from having their probation or parole revoked and may keep them out of a secure care facility. In addition, "[d]efense counsel might find that a discipline proceeding presents an unusually rich opportunity to 'discover' the witnesses and evidence that a prosecutor ultimately will present at a subsequent delinquency trial."[82]

While schools have great discretion in maintaining the discipline of their students, schools also have an obligation, in providing a FAPE, to provide services to assist students with behavioral problems. These services must be provided in the least restrictive setting and with the goal of maintaining the child in the least restrictive setting.[83] The IDEA explicitly states that, if a child's behavior impedes the child's learning or that of others, the IEP must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior."[84] Any time a child is suspended from school or otherwise removed for disciplinary reasons from the usual educational placement, school personnel must conduct a functional behavioral assessment and develop a behavioral intervention plan.[85]

80 *Burlington v. Mass. Dept. of Ed.,* 471 U.S. 359 (1985).
81 Tulman & McGee, *supra* note 1, at 13-2.
82 *Id.* at 4-2.
83 *Chris D. & Cory M. v. Montgomery County Bd. of Educ.,* 753 F. Supp. 922, 934 (M.D. Ala. 1990).
84 Individuals with Disabilities Education Act, 20 U.S.C. § 1414(d)(3)(B) (2005).
85 Individuals with Disabilities Education Act, 20 U.S.C. § 1415(k)(1)(B).

Children have the right to due process prior to their removal from an educational setting either by suspension or expulsion. The amount of process due a child varies from jurisdiction to jurisdiction, but minimally requires that the child receive notice, an explanation of the evidence against him, and an opportunity to be heard.[86] Advocates should push for maximized due process rights when advocating for a client facing suspension or expulsion. In addition, the anti-discrimination principles of •504 of the Rehabilitation Act and the ADA, and their implementing regulations, also require school disciplinarians and decision-makers to take into account and accommodate the disabilities of accused students in disciplinary actions.[87] Specifically, advocates should also be aware of the legal restrictions on suspensions for disabled children and the rights of such children to services during periods of suspension.

A. The 10-Day Rule

According to state regulations, a school district may suspend a disabled child in the same manner as a non-disabled child, as long as the child has not been removed from the educational placement described in his or her IEP for more than 10 consecutive school days.[88] In keeping with this general rule, the regulations define a change of placement as occurring in the following situations:

> 1) A student with a disability is removed from his or her current educational placement for more than 10 consecutive school days; or
>
> 2) A student with a disability is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year and because of factors such as the length of each removal, the total amount of time the student is removed, and the proximity of the removals to one another.[89]

Most school districts are better at observing the ban on suspensions for 10 consecutive days than they are at observing the ban on shorter suspensions cumulating to more than 10 days. In some districts, it is not uncommon to see disabled students with more than 20 days of suspensions for a school year, all of which have been issued in three- and five-day increments. It would be difficult to argue that such an excessive number of days of suspension does not constitute a pattern breaking the letter of the law or violate the intention of the law, which is to ensure that disabled children are not being denied a FAPE as a result of disciplinary removals.

86 *Goss v. Lopez,* 419 U.S. 565, 581–582 (1975).

87 *See* 29 U.S.C. § 794 (2005); 42 U.S.C. § 12132 (2005); 34 C.F.R. § 104.4(b)(1)(iv) & (b)(4) (2005); 28 C.F.R. § 35.130(b)(3)(i) & (b)(7) (2005).

88 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 519(B)(1) (2004) states:
School personnel may order a removal of a student with a disability from the student's current educational placement for not more than 10 consecutive school days for any violation of school rules to the extent a removal would be applied to a student without a disability, and school personnel may order additional removals of not more than 10 consecutive school days in the same school year for separate incidents of misconduct as long as the removals do not constitute a change of placement as defined in 519. A. of this section.

89 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 519(A) (2004).

It is also important to note that not all suspensions are officially recorded as such. Some schools issue "cool off" periods as punishments or otherwise send children home without filing any paperwork. In other cases, a child might be officially suspended for only one day, but the school may require that a parent conference be held before readmitting the student to classes. If the parent works or is otherwise unable to attend such a conference, a disabled child may be out of school indefinitely for a minor infraction. Situations such as these are why the law talks in terms of "removals," rather than "suspensions," when it comes to disciplining disabled students. For this reason, all days spent out of school as a result of school action should be applied toward the 10-day limit.

B. The 45-Day Exception

One exception to the 10-day rule is that a disabled student may be suspended for up to 45 days if the disciplinary infraction involves weapons, drugs[90] or the infliction of "serious bodily injury."[91] Even if the infraction does fall into one of these three categories, a school district may suspend the disabled child to an "appropriate interim alternative educational setting," rather than to the typical at-home setting without services.[92] These are the only circumstances under which a disabled child may be suspended for more than 10 consecutive days.[93]

C. Services During Removals and Interim Alternative Educational Settings

Any time a student with a disability receives a long-term suspension or a short-term suspension, which is part of a pattern constituting a change in placement, the school district must continue to provide educational services during the course of the removal, regardless of whether the behavior is related to the student's disability.[94] As noted in the previous section, these services should be provided in an appropriate interim alternative educational setting, which must:

> 1) Provide services that will enable the student to continue to progress in the general curriculum and to continue to receive those services and modifications, including those described in the student's current IEP, that will enable the student to meet the goals set out in that IEP.
>
> 2) Include services and modifications designed to address the behavior... and to prevent the behavior from recurring if the removal is [for drugs, weapons or based on a determination that the student may cause injury to himself or others].[95]

90 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 519(B)(2) (2004).
91 20 U.S.C. § 1415(k)(1)(G)(iii) (2006).
92 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 519(B)(2) (2004).
93 Also worthy of mention: The new IDEA amendments in § 1415(k)(1)(A) added a clause stating that "[s]chool personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct." It is unclear what effect this clause will have on a school district's authority to suspend a student. However, the clause does not appear to be a "catch-all" exception to the rules for suspension, since the subsequent sections on authority to suspend remain intact.
94 20 U.S.C. § 1415(k)(1)(D) (2006).
95 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 519 (E)(2).

Placements meeting these requirements could be in-school suspension, a special school or even homebound services, depending on the length of the suspension, the services offered and the particular needs of the student. Many times, a school district will simply send work home with the child and claim that this fulfills their responsibility to continue providing educational services. However, it is unlikely that such minimal services during a long-term suspension will enable the child to "continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP."[96] In the end, the determination of what alternative setting is appropriate in each individual case is made by the IEP team.[97] As with all decisions regarding placement, a parent or advocate disagreeing with the decision of the IEP team can appeal the decision via a due process hearing. In matters involving disciplinary removals, an expedited request requires a hearing within 20 days of the request and a decision 10 days after that.[98] These provisions are designed to ensure that no disabled child is denied a FAPE by the school system through disciplinary removals.

D. Other Procedures Involving Disciplinary Removals

Even if the student does commit an infraction punishable by a 45-day suspension, once the 10-day cumulative limit has been reached, the school must implement a number of heightened procedural safeguards to ensure that children are not being denied educational opportunity as a result of their exceptionalities. Below is a list of the most important of these procedural protections related to discipline.

1. Manifestation Determination Review

Whenever a disabled student is subjected to a disciplinary change of placement, the school district must conduct a Manifestation Determination Review ("MDR") within 10 days of the decision to suspend.[99] An MDR is a process in which:

> [T]he local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations and any relevant information provided by the parents to determine:
>
> 1) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
>
> 2) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.[100]

96 20 U.S.C. § 1415(k)(1)(D)(i) (2006).
97 20 U.S.C. § 1415(k)(2) (2006).
98 20 U.S.C. § 1415(k)(4)(B) (2006).
99 20 U.S.C. § 1415(k)(1)(E)(i) (2006).
100 *Id.*

If the MDR determines that either of these two conditions applies, then the behavior is determined to be a manifestation of the child's disability. If the behavior is found to be a manifestation of the student's disability, the school must take the following steps:

> 1) Conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement...;
>
> 2) In the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and
>
> 3) ...Return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.[101]

It should once again be stressed that even if the behavior is found not to be related to the student's exceptionality, a FAPE must still be provided.[102] State regulations establish, however, that if the MDR does conclude that the behavior is related, then a student should not be suspended at all.[103] Just as one would not punish a sightless child for not being able to see, lawmakers did not want children with emotional or behavioral disorders being punished for inappropriate conduct that is a manifestation of their exceptionality.

2. Functional Behavioral Assessments and Behavior Intervention Plans

A disabled child who is subjected to a change of placement should also receive a Functional Behavioral Assessment ("FBA") and "behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur."[104] The behavioral intervention services that will be provided should be outlined in a document known as the Behavior Intervention Plan ("BIP"). Together, the FBA and the BIP make up what is known as the Behavior Management Plan. Both the FBA and the BIP should be developed within 10 days of the commencement of the removal.[105] The BIP should be reviewed by the IEP team after each suspension over the 10-day limit, regardless of whether or not the suspension is part of a pattern constituting a change in placement.[106]

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101 20 U.S.C. § 1415(k)(1)(F) (2006).
102 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 519(I)(1) (2004).
103 Bulletin 1706, La. Admin. Code tit. 28, Part XLIII, § 519(H)(6) (2004) ("If the IEP team and other qualified personnel determine that the behavior is a manifestation of the student's disability, the disciplinary removal cannot occur, unless the removal is in accordance with § 519.B.2.(a) and (b) and § 519 D. of these Regulations.").
104 20 U.S.C. § 1415(k)(1)(D)(ii) (2006).
105 Bulletin 1706, La. Admin. Code § 519(F) (2004).
106 *Id.*

E. Disciplinary Protections for Children Not Yet Identified as Disabled

A child is still protected by IDEA rules on discipline even if he is not yet classified as a student with an exceptionality, provided that the school district had knowledge that the student was a child with a disability before the student committed the offense for which disciplinary action is being contemplated.[107] A school district may be determined to have had knowledge of a student's disability if the parent requested an evaluation but no action was taken, if the parent presented the school with a medical diagnosis or, in some cases, if the student clearly exhibited behavior consistent with a given exceptionality.

V. SPECIAL EDUCATION ADVOCACY IN THE DELINQUENCY SYSTEM

Understanding the rights of a disabled client is crucial in ensuring that those rights are recognized by the juvenile court system and by the local school district. Special education rights, when used creatively, can provide a basis for challenging a child's waiver of Miranda rights, motions to dismiss, and arguing against detention and secure care. Generally being able to present issues of disability to the juvenile court ensures that your client is treated in accordance with their capabilities.

A threshold question before pursuing special education rights or raising issues related to a disability in juvenile court is whether the child wishes to pursue their rights. "An attorney representing a child in a delinquency matter cannot, consistent with professional ethics, pursue special education rights if the child does not want to pursue those rights."[108] You should counsel your client regarding the consequences of raising special education issues and advise them of anticipated benefits in their delinquency case and access to services, but it is your client's decision to make.

A. A Sampling of Theories and Strategies Available to the Delinquency Defense Attorney

Truancy: In a truancy case, an attorney can challenge the delinquency court's jurisdiction based upon an alleged failure of the school system to exhaust administrative remedies regarding the child's special education needs.

Miranda: An attorney can obtain evaluations of the child through the special education process and, if beneficial, use those evaluations to demonstrate that the child was not capable of waiving Miranda (*Miranda v. Arizona*, 384 U.S. 436 (1966) rights knowingly and intelligently.

107 20 U.S.C. § 1415(k)(5)(A) (2006) ("A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this part if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.")
108 Tulman & McGee, *supra* note 1, at 1-8.

Mens Rea: An attorney can demonstrate through expert testimony that, notwithstanding appearances and people's ordinary interpretations, a child with mental retardation or with a receptive and expressive language disorder was not interacting meaningfully or knowingly (i.e., was not acting with criminal intent) with a purported co-defendant in an alleged crime or delinquent act.

Behavior Management Program: For a child who is incarcerated and who is seriously emotionally disturbed, an attorney can develop, with the assistance of a clinical psychologist, a behavior management program within the IEP that prohibits the use of aversive techniques (e.g., corporal punishment, restraints, harsh language) and requires the use of positive reinforcement and rewards.

Denial of FAPE: In a special education hearing, an attorney can prove that the juvenile incarceration facility is not providing and cannot provide the delinquency client with a free appropriate public education; the attorney could use such a finding to argue that the delinquency court must order the client moved to a more appropriate place or released to the community.

Collaboration: An attorney might find that engaging personnel from an incarceration facility with regular requests and challenges—including record production, evaluations, IEP meetings and hearings—tends to make those personnel more receptive to a good-faith proposal from the attorney to place the child in a special education placement outside of the institution.[109]

B. Motion to Suppress

Depending on the level of functionality of your client based on educational records and evaluations, it may be appropriate to file a Motion to Suppress statements and resulting evidence on the basis that your client was incapable of understanding his Miranda rights and was, therefore, incapable of knowingly waiving those rights. "Courts have demonstrated concern and skepticism regarding the ability of a child who has educational difficulties to waive Miranda rights."[110] In *Cooper v. Griffin,* the Fifth Circuit determined that the *Miranda* waiver of two petitioners who were enrolled in special education classes with IQs estimated as being between 61 to 67 were invalid.[111] The court emphasized that both petitioners had been diagnosed as being mentally retarded, could barely read, had no experience with the legal system and could not have understood the "gravity of the charges against them, the conse-

109 *Id.* at 2-2.
110 *Id.* at 2-14.
111 *Id.* (citing *Cooper v. Griffin,* 455 F.2d 1142 (5th Cir. 1972)).

quences of a conviction, any defenses which might be available to them, or any circumstances which might mitigate the charges."[112]

C. Motion to Dismiss

Article 876 of the Louisiana Children's Code provides that "[f]or good cause, the court may dismiss a petition on its own motion, on the motion of the child, or on the motion of the petitioner."[113] In interpreting good cause, Louisiana courts have held that "the juvenile court is vested with broad discretion to arrive at solutions which balance the needs of the child with the interests of society."[114] Given the court's discretionary power, persuasive arguments negating the need for juvenile court supervision are appropriate in Motions to Dismiss before the juvenile court.

Consideration of a Motion to Dismiss should be given particularly in cases in which the school itself has referred the child to the juvenile justice system. Schools are required to make accommodations and provide specialized services to students with disabilities. It is not appropriate for a school to utilize the juvenile justice system to manage and discipline students with disabilities.

> School officials may not, generally speaking, sanction a student for conduct that is related to the student's disability. Rather, if the behavior is a manifestation of the student's disability, the school must appropriately modify the child's IEP and, if necessary, change the child's placement (through the IEP process) as a means of addressing the student's behavior.[115]

When school officials file delinquency charges based upon conduct stemming from the student's disability (the very conduct which federal law requires the school to address), advocacy can bring the school's breach of substantive obligations to the child to the court's attention for consideration in the case.[116]

Courts are more likely to consider motions to dismiss status offense cases rather than delinquency cases in weighing the impact of the IDEA requirements. As the nature of the delinquency allegations increase in severity, courts are more likely to weigh community safety concerns along with the best interests of the child.[117] However, efforts to push for enhanced services through the school system and IEP process can result in a change in circumstances negating the child's need for rehabilitative services. Since the juvenile court's jurisdiction over the case is, in part, premised on the need for care and rehabilitation of the child, if "an advocate can demonstrate that the child is not in need of care and rehabilitation or that the child is receiving adequate care

112 *Id.* (citing *Cooper*, 455 F.2d at 1145).
113 La. Child. Code. Ann. art. 876 (2006).
114 *In re Davis,* 96-0337 (La. App. 4th Cir. 10/30/96); 683 So. 2d 879, 880.
115 Tulman & McGee, *supra* note 1, at 2-5 (citing *S-1 v. Thurlington,* 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 454 U.S. 1030 (1981)).
116 *Id.* (citing *Morgan v. Chris L.*, 927 F. Supp. 267 (E.D. Tenn. 1994), *aff'd*, 106 F.3d 401 (6th Cir. 1997), *cert. denied*, 520 U.S. 1271 (1997)).
117 *Id.*

and rehabilitation through sources other than the court, the court may relinquish—and perhaps must relinquish—its power over the child."[118] Therefore, a motion to dismiss may be appropriate when the child is not in need of additional rehabilitative services.

D. Advocating for Special Education Services at Disposition

Some of the same concepts discussed above, even if not resulting in dismissal of the delinquency charges outright, are applicable at the disposition stage of the delinquency case. If counsel for the child demonstrates to the court that all necessary rehabilitative services are being provided through the school system's obligations to provide special education services to the child, this negates the need for the child to be committed to secure custody and may even negate the need for probationary services. In addition, the child's disabilities and corresponding IEP should be considered when determining terms of probation or parole. For instance, if the child is required to attend school, but the IEP provides that the child will receive home

118 *Id.* at 2-7.

tutoring and alternative school services, the court should be made aware of the IEP and the terms of probation should be altered accordingly.

VI. CONCLUSION

Special education is a dynamic field of law, highly regulated yet still evolving and open to interpretation in many areas. The lack of legal practitioners engaging in this legal sphere has resulted in a relatively sparse amount of case law in Louisiana. As a result, special education law in this state is particularly ripe for development by advocates who realize the potential that schools have for positively affecting emotionally and behaviorally disabled youth.

Special education laws also provide an expanded set of advocacy tools for juvenile defenders representing youth in juvenile court which can result in accommodations for disabled juveniles, the reduction of the use of detention and secure care, and, in some situations, in the dismissal of delinquency cases. Familiarity with special education laws and procedures is an integral part of providing effective delinquency representation to children.

PART II
THE PRACTICE: REPRESENTING CHILDREN AND YOUTH AT EVERY STAGE OF THE PROCESS

CHAPTER 7

DEVELOPING AN ATTORNEY-CLIENT RELATIONSHIP WITH A CHILD OR ADOLESCENT

Children's underdeveloped intellectual and emotional capabilities cause them to act differently than adults when communicating, making decisions and relating to their attorneys. Understanding the developmental characteristics of children is crucial to developing effective attorney-client relationships with them. This chapter addresses the specific challenges of developing a relationship and building rapport with a juvenile client and provides suggestions for interview skills specifically geared towards the developmental capabilities of juvenile clients.

I. BUILDING A RAPPORT WITH YOUR CLIENT

The crucial first step in the representation of a youth in juvenile court is to develop an effective attorney-client relationship. The attorney must foster a trusting and open relationship to maximize the effectiveness of her representation. Starting to build rapport with the youth at the first meeting is important in ensuring such a relationship. Adolescents tend to be distrustful of authority figures. In addition, children involved in the delinquency system have a greater chance of being challenged with disabilities and of having been exposed to violence in their homes and communities.[1] These factors create more challenges to communicating effectively and establishing a trusting relationship.

Even after the initial interview, it is important to continue to sustain the rapport built with a young client by maintaining regular contact with her. An attorney should continue to meet with or talk to her client regularly, at least once every two weeks if the child is in the community, and at least once every week if she is detained.[2] Regular contact not only allows the attorney to maintain a trusting relationship with her client, but also provides deadlines to perform specific tasks, and reminds the client of the pending case and pre-trial obligations to the court.[3]

A. The Initial Interview

The initial client interview is by far the most important, because it sets the tone for the attorney-client relationship. It also provides necessary information that will guide the course of advocacy. It is crucial for the attorney to prepare for this inter-

1 *See supra* ch. 3.
2 National Juvenile Defender Center, Juvenile Defender Delinquency Notebook: Advocacy and Training Guide 28 (2d ed. 2006), *available at* www.njdc.info/pdf/delinquency_notebook.pdf [hereinafter "NJDC Delinquency Notebook"].
3 *Id.*

view and use it as an opportunity to make a good first impression and gain the trust of the child. This includes reviewing the police report, petition and any other court documents to which the attorney has access. The attorney must be familiar with these documents and prepared to explain and utilize them during the interview. The attorney should also be familiar with the statutory provisions of the charged offenses and prepared to explain them to the child.

Building trust with a child is a difficult task; adolescents tend to assume that there is no common ground between themselves and authority figures. When interviewing a child or adolescent, an attorney must be sensitive to structuring questions and using a tone of voice that is non-judgmental. This is essential to building trust with a teenage client. "Interviewers must take special care to structure questions and use a tone of voice that conveys to the young person that the interviewer is not judging the young person, but is instead truly interested in who s/he is."[4] Above all else, an attorney must show the client that she cares about what the client thinks and what happens to her, keep the client informed, answer the client's questions plainly and clearly, be timely and responsive to all of the client's inquiries, and keep promises.[5]

The initial interview should take place as soon as possible after the case is assigned and must occur before the first court date. Ideally, this interview will take place in the attorney's office or in the child's home. If the child is in detention, this initial interview will likely have to take place in the detention center and will need to occur before the initial continued custody hearing. Two adults should not interview a client at the same time, because this leads to a feeling of being "ganged up on."[6]

It is important to set aside sufficient time for a thorough and unhurried initial interview. An unhurried interview allows the attorney to obtain information necessary to effectively represent the child at the initial court hearing. It also allows the attorney to take the time to get to know the child and explain the court process, and provides an opportunity for the child to ask questions. Interviewing a child or adolescent takes longer than interviewing an adult because it often takes more time to explain terms and processes to adolescents in a way that that they will understand. Additionally, setting aside time for the initial interview demonstrates to the client that the attorney is committed to the child's case. It is an important step in gaining the child's trust. A hurried interview in the courthouse just before the first court date leaves the child feeling unimportant and alienated. Thus, an attorney should set aside at least an hour for the initial client interview and be prepared to schedule supplemental interviews before the first court date, if necessary.

The attorney should also make arrangements to meet with the child's family before the first court date. This enables the attorney to introduce herself and obtain addi-

4 American Bar Association Juvenile Justice Center et al., *Talking to Teens in the Justice System: Strategies for Interviewing Adolescent Defendants, Witnesses, and Victims* 2, *in* Lourdes M. Rosado, ed., MacArthur Foundation, Understanding Adolescents: A Juvenile Court Training Curriculum (2000), *available at* www.njdc.info/pdf/maca2.pdf [hereinafter "*Talking to Teens*"].

5 NJDC Delinquency Notebook, *supra* note 2, at 29.

6 *Talking to Teens*, *supra* note 4, at 9.

tional information about the child's background. Parents or guardians can provide important information about the child's family, education, and mental health. It is also an opportunity to obtain signed authorization for release[7] of information forms so the attorney can access documents from various agencies.

During the initial interview, the attorney will need to explain, in basic terms, her role and her reasons for talking to the child. The attorney should explain the significance of attorney-client privilege and the way that confidentiality works. Clients need to be reassured that they can rely on and trust their attorney.

The attorney should explain the nature of the client's charges, the range of possible penalties, and the client's due process rights. It is also important for the attorney to talk to the client about the court process and the expected timelines. A good attorney will ask her client questions to ensure that the client understands. Additionally, a good attorney encourages her client to ask questions. When taking notes, the attorney should let the client know this at the beginning of the interview and explain why it is important to write everything down.

The client should be informed of the kinds of questions she will be asked throughout the interview. The attorney should explain that it is very important that the client be honest and provide the attorney with as much information she can. The attorney should also let the client know what she plans to do for the client and let the client know what the attorney needs from the client in order to provide her with good representation.

Although it is appropriate to have the client's parents present during introductions and an explanation of the interview process, the initial interview relating to the case and the circumstances of the case must take place in a confidential space with only the attorney and the client present. Having the parents present effectively waives attorney-client privilege. Parents are not obligated to keep the client's confidences. If the parents are present, they can be subpoenaed to testify regarding the nature of the discussion in court. If a parent is upset about being asked to allow the attorney private time with the client, the attorney should respectfully explain these confidentiality rules and explain that she is counsel for the child, and not for the parents.

In the course of the interview, the attorney should employ "developmentally-sensitive questioning."[8] The interviewer must structure questions according to the juvenile's level of language competence and how the juvenile processes information.[9] In the first 5–10 minutes of the interview, the attorney should start to gauge the communication abilities of the child. The attorney should follow the child's lead in terms of the complexity of the conversation. The interviewer should start out explaining things in simple, straightforward terms. It is important to be alert to the client's abilities, because the attorney doesn't want to talk over the child's head. On the other

7 *See* Appendix for a sample release form.
8 [8] *Talking to Teens, supra* note 3, at 2.
9 *Id.*

hand, the attorney should avoid "dumbing things down" too much for the client in case she is intellectually developed enough to understand more complex terms. Gaining the client's trust will require that the attorney not offend her by making her feel stupid, either by talking in a way that she does not understand or talking to her in a way that makes her think the attorney underestimates her abilities. It is best to start out cautiously while gauging the abilities of the client. The attorney should start out the interview slowly, asking easily answered questions about the client's address and school history and paying close attention to the nature of the client's responses. The attorney should model the client's language style and be flexible in restructuring the remainder of the interview to suit the client's abilities.

During the initial interview, it is important to gain as much information about the client as possible by asking her questions about her family history, brothers and sisters, friends, school, medical history, mental health history and past involvement with the juvenile or criminal justice systems, as well as the specifics relating to the case at hand. A comprehensive sample questionnaire appropriate for initial interviews can be found in the appendix of this manual. Before ending the interview, the attorney should give the client and her parents a business card and other information regarding how to contact the attorney with questions or further information. The attorney should also counsel the client not to speak with any one else, even her parents, about the specifics of the interview or about the circumstances of the charges, unless the attorney is present.

B. Getting to Know Your Client

1. Educational History and Developmental Disabilities

Juvenile justice professionals must be alert from the earliest moment for clues to a youth's special education status or existing unidentified disabilities. This process, which should become part of the standard operating procedure, includes carefully interviewing the youth and her parents regarding the child's educational history, routinely gathering educational records, procuring examinations by educational and mental health experts, investigating educational services at potential placement facilities, and coordinating juvenile court proceedings with the youth's Individualized Education Program ("IEP") team.[10]

In the initial interview, the attorney should make sure to ask questions about the child's educational status: for example, questions about the kinds of classes she is taking in school, how she is doing in school, whether she is attending school, and whether she is in any special education classes or receiving tutoring or counseling services. The client's parents or guardian should be asked similar questions regarding the child's educational status. Obtaining release of information forms at the first meeting will also expedite obtaining documentation from the school, which will provide important additional information about the client's educational history.

10 *See supra* chapter 6 for more information about special education rights.

2. Mental Health Needs

Because many children involved in the juvenile justice system have mental health diagnoses and disabilities, it is important to obtain information about the mental health of a client at the earliest possible moment. Initial meetings with the client and her family are an opportunity to obtain preliminary information about any disabilities or mental health needs. This knowledge assists the attorney with understanding how to communicate with the client, so as to compensate for any special needs, and will also be an invaluable tool for courtroom advocacy.

3. Race and Gender

It is important to be aware of the effect that race, ethnicity and gender differences can have on the attorney-client relationship. If the attorney is of a different race or ethnicity from the client, this may create a greater hurdle in the rapport building process, as the client may be distrustful of people of your particular race or ethnicity. Counsel should not take a client's preconceived notions personally; a client is most likely relating to the attorney based on prior negative experiences. An attorney can try to ease a client's concerns by showing the client that she is committed to representing the client and that she is not judging the client.

Gender issues can also present a barrier to the development of an attorney-client relationship. Clients may have difficulties relating to attorneys of the same sex or of the opposite sex, depending on their past experiences in life. A male client charged with a sexual crime may be more reluctant to discuss the specifics of the incident with a female attorney, or a female client may be uncomfortable discussing her own sexual victimization with a male attorney. Adolescent clients may also try to flirt with attorneys. In all of these situations, it is important for the attorney to maintain her composure, remain professional and remain empathetic to the circumstances of her client. Most of these barriers can be overcome when an attorney is open and nonjudgmental toward the client and works to build rapport utilizing the techniques in this chapter.

4. Competency

During initial interviews with a client, it is important to make assessments regarding the client's competency. If, despite an attorney's efforts to build rapport and accommodate a client's special needs and disabilities, it becomes clear that a client is unable to understand the nature of the proceedings or assist in her defense, the attorney may need to raise competency or capacity concerns to the court. This will result in a temporary hold on further proceedings and the appointment of a sanity commission to evaluate your client.[11]

11 *See infra* chapter 10.

II. INTERVIEWING SKILLS: STRATEGIES FOR INTERVIEWING CHILDREN AND ADOLESCENTS

Given the importance of building relationships with clients and the difficulties in developing trusting and effective attorney-client relationships with children, there are a number of specialized skills that can be helpful. This section draws from the techniques and suggestions of national juvenile justice experts from the American Bar Association's Juvenile Justice Center, the National Juvenile Defender Center, the Juvenile Law Center and the Youth Law Center to provide a guide to developing effective skills for communicating and working with youthful clients.

A. Differences in the Cognitive Capacities of Adults and Adolescents Can Pose Challenges in an Interview[12]

Because the brains of children and adolescents are not fully developed, they do not process information or communicate in the same manner as adults. Adult advocates should be aware of the following common differences:

1) *Adolescents process questions differently from adults.*[13] While some adolescents are beginning to think and express themselves like adults, their intellectual development is a slow process. Learning difficulties and attention deficits can also affect their ability to process questions. "Adult interviewers must gauge an adolescent's ability to process language, his/her level of vocabulary, ability to abstract, and other indicators of cognitive development in order to structure appropriate questions."[14]

2) *Adolescents think more in the present and have trouble focusing on the future.*[15] Adolescents tend to place greater weight on short-term consequences, both positive and negative, in their decision-making. "The interviewer has to somehow address the teen's immediate concerns to put the interview back on track."[16] For instance, a child may only be able to consider her immediate concern about getting out of detention and back home to her family. She may, therefore, be thinking only in terms of which actions will, in her mind, get her home the fastest. Addressing this concern and letting the client know what you will do to help her get home may enable her to move on to discussing other important issues in her case.

3) *Adolescents are fairness fanatics.*[17] Adolescents tend to become fixated on an idealist notion of what should be and are intolerant of anything that seems unfair or arbitrary.[18] Unfortunately, many of the workings of the juvenile justice system seem unfair and arbitrary, giving the child

12 *Talking to Teens, supra* note 3, at 7.
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*

advocate a huge hurdle to overcome in working with young clients. Teens also often feel cheated about the interviewer's time constraints. Taking the time to explain the process to the child and the laws that govern the juvenile court process may help allay the concerns. Listening and being empathetic to the injustice that the child describes will aid you in gaining the child's trust.

B. Strategies for Successful Interviewing

In order to facilitate a successful interview with a client, the attorney must assess the juvenile on three different levels and tailor her interview techniques accordingly:

1) What is the young person's level of development?

2) Are there any disturbances in the adolescent's normal development? (For example, past trauma, depression, aggression.)

3) What is the impact of the current situation on the adolescent and his/her ability to communicate? (Juvenile defendants are often worried about what will happen to them if they talk and are fixated on getting out of detention.)[19]

The attorney should consider the answers to these questions as she structures the initial interview and the relationship with the adolescent client.

C. Tips for Interviewing Adolescents[20]

The following techniques may result in a more productive interview with a client:

- Build rapport and put the child at ease;
- Create a comfortable environment;
- Start conversation with non-threatening, less serious topics;
- Follow the adolescent's lead;
- Recognize the juvenile's strengths;
- Find common interests and let the child talk about them;
- Don't take the adolescent's behavior personally;
- Use the "pacing" technique: matching behavior to that of the interviewee in terms of body posture and movement (unless the youth is rigid—then displaying a relaxed calm model); matching speed of talk, voice tone, etc.;
- Be true to oneself—the youth will see through any faking or attempts to say things or act a certain way just to win her trust. Attorneys must find a

19 *Id.* at 10.
20 *Id. at* 10-15.

balance that allows them to stay true to who they are, or their clients will begin to distrust them;

- Invite the youth to ask questions throughout the interview, and respond appropriately when asked; openly answer each question as if it is important. Avoiding opening up to questions and then skirting around the issue or refusing to answer will result in a loss of trust;
- Avoid long questions with a lot of information in them;
- Avoid giving more than one option in a single question—adolescent clients most easily process direct, simple questions;
- Use visible props, as appropriate, to facilitate the conversation;
- Avoid asking for abstract thinking (questions such as "What if...?");
- Avoid making analogies;
- Ask open-ended questions;
- Ask questions when the attorney doesn't understand what her client is saying to her. This often leads to an interesting discussion and can sometimes be a basis for building rapport, as when a client thinks it's funny that the attorney doesn't understand her slang and she has to explain it. She might enjoy teaching the attorney a thing or two;
- Avoid asking questions that start with "why" or "how could you," as these terms carry judgmental implications and put the interviewee on the defensive.[21]

D. Special Skills and Techniques

1. How to Interview a Teenager with an "Attitude"

As anyone who has ever worked with teenagers, been a parent of a teenager or been a teenager knows, there are some teens with "attitude." These are teens who mock everything adults say, refuse to give a straight answer, roll their eyes and are disrespectful or, even worse, are belligerent and curse. Adolescents involved in the delinquency system are no different than average teens, and many have an attitude that may be difficult to deal with or overcome in establishing an effective attorney-client relationship.

When working with a teenager with an attitude, it is important to find a way to relate to the teen without agreeing or condoning the negative behaviors. An attorney should try not to get caught up in defending her own values or voicing disapproval of her client's behavior. Attorneys shouldn't let the teen's attitude fluster them or take the teen's attitude personally.[22] The best response is to continue the interview with

21 *Id.*
22 *Id.* at 15.

the teen in a respectful way and to explain the importance of obtaining information in order to effectively represent the teen. If the behavior is unbearable, the attorney might need to tell the client that their behavior is prohibiting the attorney from doing her job, and that she will have to stop the interview and reschedule it for a later time.

2. How to Defuse an Angry Young Person During an Interview

As discussed earlier in this manual, many young people involved in the delinquency system have been the victims of abuse in their homes or communities or have developmental disabilities. Their traumatic experiences or frustrations related to their disabilities may cause them to exhibit angry and aggressive behaviors. It is also normal for a youth who has been detained and separated from her family to feel very angry about her situation. Attempts to diffuse this anger will help establish rapport in an interview.

Throughout the interview, an attorney should continue to be interested in what the client feels and what she has to say. The attorney should verbally acknowledge the client's frustrations by saying something like: "I understand that you are very angry about your situation," or "I understand that this is very hard for you." The attorney should stay calm and sincere and try to smile and maintain eye contact throughout the interview. An empathic interviewer will help to foster a climate of calm and safety.[23]

3. Special Considerations When Interviewing a Young Client

Some juvenile clients may be young—a child as young as 10 years old can be charged as a delinquent in Louisiana. Working with and interviewing very young clients poses even greater challenges, as these youth are less developed than older teenagers and have an even harder time communicating about complicated legal issues.

The following is a list of facts to consider when interviewing a young adolescent:

- Young adolescents are much shyer;
- Young adolescents are more aware of adult power;
- Young adolescents are not as advanced in their cognitive development and have less reliable memories;
- Young adolescents are more apt to embellish stories and provide less detail;
- Young adolescents are much more suggestible and are more reliant on an interviewer's statements;
- Young adolescents are more interested in providing answers that will please the adult interviewer.[24]

23 *Id.* at 16.
24 *Id.* at 19.

Given the above considerations for working with particularly young clients, the following techniques may assist with the interview process:

- Don't give even subtle clues to young teens about your impressions about what happened because of potential suggestibility;
- Facilitate recall by asking questions such as: Why?, Where?, What actions occurred?, What were they feeling at the time? Consider using pictures that you provide or that the child draws to help with the process;
- Don't reward certain answers through body language or words. Acknowledge all answers in the same manner so the child doesn't get the idea that certain answers are the right answers;
- Don't ask leading questions.[25]

It is also important to pay close attention to competency issues in young clients, as they will be less likely to have the capacity to assist in their defense than older adolescents.

III. CONCLUSION

Working with and developing a relationship with adolescents and children takes special skill and patience. However, once a trusting relationship has been developed, working with adolescents can be very rewarding. The skills and techniques outlined in this chapter provide guidance in developing rewarding relationships with young clients.

25 *Talking to Teens, supra* note 4, at 19.

CHAPTER 8

DEVELOPING A RELATIONSHIP WITH YOUR CLIENT'S PARENTS OR GUARDIAN

Another unique aspect of representing children is the fact that children have parents or guardians who will become involved in the delinquency case. The law both protects the sanctity of the family and the right of parents to make decisions on behalf of their children, and requires that parents care for and provide for their children. Families have a constitutional right to privacy, yet that privacy can be intruded upon to protect children from abuse or neglect, or when a child becomes involved in the delinquency system.

It will be crucial for a juvenile defender to work with and develop a relationship with the parents of young clients in order to provide adequate representation. Parents are both a source of valuable information about a client's early childhood, educational and medical/mental health history and a source of support for the attorney-client relationship. The involvement and support of a client's parents are essential; parental involvement and cooperation in dispositional plans will be important in efforts to obtain services for clients in the community, so as to avoid detention.

This chapter discusses methods for developing an effective relationship with your client's parents, the benefits of such a relationships, ethical limitations on relationships with parents and a discussion of possible conflicts.

I. THE IMPORTANCE OF A POSITIVE RELATIONSHIP WITH YOUR YOUNG CLIENT'S PARENTS

When a client is a child, regardless of how independent and self-sufficient he seems and regardless of how dysfunctional his family life may be, he is probably dependent on his parents or guardian for many of life's necessities, including food, shelter, love and support. In a civil matter, a child client would not be able to retain your services for representation; his parents or guardian would have to take action on his behalf. However, the nature of juvenile court creates an interesting and unique dynamic in which a child has the right to his own attorney and is in the position to make important and autonomous decisions about his own life, perhaps for the first time. An attorney for a child charged with a delinquent act is obligated to represent the child and his expressed interests[1], even though he is a child with parents who may have strong opinions of their own about what direction the child's case should take.

1 In 1996, a Conference on Ethical Issues in the Legal Representation of Children was held at Fordham Law School to address ethical issues regarding the representation of children. The conference participants issued a series of recommenda-

While the attorney represents the child client and has obligations to zealously advocate for the client's expressed interests, parental involvement will usually help the client's case and the attorney's representation. Parents are an invaluable resource for information about the child's history, and can provide invaluable insight into the child's development, educational experiences, mental health and medical history, substance abuse history, problems with aggression and past involvement with the juvenile court system. Parents are also a good source of information regarding the client's strengths and interests. They may provide the attorney with ideas regarding how to communicate better with the client, the interests of the client, and ideas for dispositional programming for the client. Parental cooperation is also crucial in ensuring that the client is transported to appointments with the attorney, taken to mental health appointments and evaluations necessary to the case, and that he timely appears for court hearings. In addition, "[g]iven the continued reliance of youth on their parents, lawyers should expect that parents will retain considerable influence over the values, perspectives and even legal interests of youth through late adolescence."[2] Thus it is important that juvenile defenders attempt to work with their clients' parents to the extent possible and as allowed by the client.

A. Developing a Relationship with Your Client's Parents

The sooner an attorney begins to develop a positive relationship with the client's parents or guardian, the better the representation for the client will be. The attorney should schedule an initial interview with the parents or guardians as soon as feasible after being appointed to the case. It's possible to schedule a preliminary meeting with the client and parents together, so long as there is time for an in-depth confidential conversation alone with the client. The attorney-client privilege does not extend to parents, and parents could be subpoenaed by the state to testify regarding any conversations they observe between the attorney and the client. The attorney can, however, utilize time spent with both the client and parents to explain the attorney's role and the court process, and to get general non-controversial background information, such as phone numbers, addresses, basic school history information and family information.

The attorney should consider a private interview with the parents early in the representation. However, she must first make sure to discuss this with her client before obtaining the client's approval. An initial meeting with the parent is an opportunity to explain the court process and the attorney's role. It should be clearly explained to the parent that the attorney is counsel for their child and is bound to zealously represent the client, take direction from the client and even keep client confidences from the parent. The parents should be advised that the attorney does not represent them, and is not obligated to keep their confidences nor obligated to follow their expressed

tions recognizing a child's right to independent legal counsel. *See Proceedings of the Conference on Ethical Issues in the Legal Representation of Children: Recommendations of the Conference,* 64 Fordham L. Rev. 1301, 1302 (1996).

2 Kristin Henning, *It Takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children and Lawyers in Delinquency Cases,* 6 Nev. L.J. 836 (2006).

interests, even if they are expressing what they believe to be the best interests of the child. The parents should be advised that they are free to obtain their own attorney to represent their interest in the case, particularly when abuse and neglect issues are likely to arise.

The unique relationship that an attorney has with a client may be difficult for some parents to understand, and may even cause resentment among parents who are accustomed to making important decisions on behalf of their children and who wish to continue to have such a role throughout the juvenile court process. It is important to realize the difficulty of the situation for the parent. Most parents are accustomed to taking care of their children and making important decisions on their behalf. It may be difficult for them to accept a scenario in which another adult is aiding their child with important life decisions independently of their input. An attorney representing a youth must be patient with the client's parents and their frustrations and explain clearly the attorney role and the ethical obligations an attorney is bound to provide when representing a child.

B. The Initial Parent Interview

After the attorney has clearly explained to the parents her role and the parameters of her representation, she can begin to obtain valuable information from the parents. The attorney should ask the parents for detailed information regarding the client's childhood, past behaviors, medical and mental health history, educational history, family traumas, communication abilities and interests. "When the parent is familiar with how the child receives and processes information, the parent may also help the lawyer explain concepts in terms the child will understand. Competent parents may also help the lawyer and the child plan meaningful case strategies and choose between various options throughout the case."[3] The attorney should ask the parent about concerns they have about their child and whether they believe the child is in need of any services. She should also ask the parent about any family problems that may be affecting the child's behavior. The attorney should be able to get a sense from the parents of what services they are interested in obtaining for themselves and their family, and whether they are willing to participate in family counseling, parenting classes or other treatment that may be ordered by the court in the course of the case. (*See* "Sample Parent Interview Questions" in the appendix of this manual.) The attorney should make sure to explain to the parents the importance of parental involvement in the court case. Judges will often appreciate involvement of parents through attendance of court dates, participation in programming and willingness to work with a dispositional plan.

3 Catherine Ross, *Implementing Constitutional Rights for Juveniles: The Parent-Child Privilege in Context*, 14 Stan. L. & Pol'y Rev. 85, 107 (2003).

II. POTENTIAL CONFLICTS IN WORKING WITH PARENTS

"While the need for parental involvement in the juvenile justice system is significant, the risk of conflict between children and parents in the system is equally great."[4] As discussed above, there are many benefits in working with the client's parents over the course of a delinquency case. However, there are also potential conflicts which may arise and of which every attorney should be aware.

Unfortunately, but perhaps predictably, there is a prevalence of conflict in families with delinquent children. Families involved in the juvenile justice system tend to experience higher rates of emotional turmoil and conflict than other families.[5] These familial conflicts may affect the willingness of a child's parents to work with an attorney or the juvenile court and may create a dynamic in which greater conflicts are likely to develop between the expressed interests of the child and those of the parents. Parents from dysfunctional families may also act out of self-interest, hoping to avoid being held responsible themselves for neglect or failure to adequately discipline their child. This is a legitimate fear as delinquency cases can be converted to Families in Need of Care ("FINS") cases in Louisiana, which result in intervention with the entire family. In addition, the juvenile courts in Louisiana handle both delinquency cases and abuse and neglect cases, and may be inclined to hold parents accountable for their failures to provide for their child in certain cases.

One source of conflict may be a difference in interests and expectations of the parents and child. While a juvenile client may be interested in beating a charge, parents may be concerned with holding the child accountable for his actions, teaching him a lesson, protecting their community or family members, or simply punishing the child for acting out.[6] As a result, parents may encourage the child to plead guilty to a charge—wanting him to take responsibility for his actions and face the consequences. Parents may have a "misguided and exaggerated view of what the juvenile justice system can accomplish,"[7] and may not realize the long-term ramifications of a finding of delinquency on their child's life.

In some instances, parents may align themselves with law enforcement officers and may encourage a judge to be harsh on their child because of their moral feelings that the child should be punished for their illegal actions or misbehavior. Working with a parent who has this focus obviously creates conflict and may inhibit the attorney's ability to include them in the advocacy efforts of the client's case. However, if parents appear to be sabotaging their child's case, it may be due to differences in culture that the attorney may not be aware of. Families may be saying, "send him away, hold him accountable," but what most parents really want is for their child to do well. It may be a misunderstanding of the system itself that creates some of these views. If the

4 Henning, *supra* note 2, at 839.
5 Laurence Steinberg, *Autonomy, Conflict and Harmony in the Family Relationship*, *in* At the Threshold: The Developing Adolescent 255 (1990).
6 Henning, *supra* note 2.
7 *Id.*

family has support or an advocate, they may be able to come to a better understanding of what the system can do and under what circumstances they have a right to demand services. Louisiana's statewide parents advocacy organization, Families and Friends of Louisiana's Incarcerated Children, can provide this support and advocacy and can help parents of juvenile clients become advocates for their child.[8]

Another source of potential conflict between the interests of a young client and his parents is the potential for legal liabilities against the parent. In certain circumstances, a parent may be fined, charged with neglect, held in contempt by the court, criminally charged with abuse against their child, face the removal of the child and other children from their custody and, in some cases, may face civil liability for the actions of their child. When the parent is facing potential liability, there is a clear conflict of interest. Under such circumstances, the attorney should advise the parents that the situation has created a conflict of interest and that parents should seek independent legal assistance.

Another potential conflict arises when a parent resents or distrusts the child's attorney. Parents may view the attorney as another part of the juvenile justice system and may not see the attorney as an ally for their child. This may cause parents to encourage their children to waive counsel or even sabotage the child's trust in his juvenile defender.[9] Other parents may resent the attorney's prying into personal family affairs and the attorney's influence and involvement in their child's life.[10] A parent may further resent the nature of the attorney-client relationship when the parent is held financially responsible for the provision of legal services to their child,[11] thinking that if they pay for the services, they should be allowed to make decisions in the case. If this occurs, the attorney should again explain to the parents that your legal obligation is to their child, and not to them.

Dealing with conflicts with parents may be challenging. Attempting to maintain communication with the parents and to keep them advised of non-confidential developments, such as court dates and procedural information, is key to maintaining their trust. While the child's attorney is not bound to provide parents with this information, it will assist with developing a positive relationship. The attorney should keep in mind, however, that while the attorney is bound to respond to his client's inquiries and to keep his client informed of developments in their case, the attorney is not bound to provide the same services to the parents. It is a courtesy, however, that may improve the relationship between the parents and the attorney. If conflicts continue, the attorney must continue to explain and hold firm to their role as the child's attorney.

8 Families and Friends of Louisiana's Incarcerated Children ("FFLIC") is a statewide grassroots organization dedicated to supporting families with children involved in the juvenile delinquency system and effecting statewide reforms. Parents can be referred to FFLIC at 188 Williamsburg Avenue, Lake Charles, Louisiana 70605 or by phone at: (337) 562-8503.
9 Henning, *supra* note 2.
10 *Id.*
11 *Id.*

In extreme cases, when the conflict of interest inhibits the attorney's ability to advocate for his client's interests, the attorney may have to alter the nature of her relationship with the parents. The attorney needs to explain that there is a conflict of interest, and that the attorney will continue to provide their child with zealous representation, but that the attorney will be unable to work with the parent. In these extreme cases, the client will have to be advised not to discuss their case with their parents because of the potential for conflict. While this puts the client in an awkward position and may upset the parent, it may be necessary in cases of conflict.

III. CONCLUSION

While there is a potential for conflicts in working with a young client's parents, the opportunities for enhanced services to the client with parental input is invaluable. Under most circumstances, the child's parents are an integral part of his life. Their knowledge of the client's history probably surpasses the client's own knowledge. Parental participation in treatment and dispositional plans can make the difference between a placement in secure care and a placement at home in the community.

CHAPTER 9

ADVOCACY STARTS AT THE BEGINNING: ARREST AND CUSTODY

Although in some jurisdictions, juvenile defenders are not appointed until the first court hearing in a case, involvement of defenders at the earliest possible stage in delinquency proceedings is crucial. If appointments do not occur until continued custody hearings or initial hearings, the attorney may want to work with the local juvenile court and detention center to create some mechanism for earlier appointment or notification of new juvenile cases and juvenile arrests. Effective advocacy from the point of arrest, and particularly from the initial custody hearing, can make a dramatic difference in the course of a child's case and, indeed, the course of his life.

Challenging entry into the system, as well as the use and misuse of detention, is critical at the early stages of juvenile court proceedings; research shows that children and youth who are detained prior to adjudication are more likely to be incarcerated at disposition or sentencing.[1] Even more troubling, "[s]ocial scientists agree that time spent in detention increases the likelihood that a child will be a repeat offender."[2] Therefore, early advocacy to prevent preadjudication detention and to challenge cases at the earliest possible moment is important. National standards call for juvenile defenders to provide prompt advice and action.[3] This chapter discusses how children and youth enter the delinquency system, strategies for challenging entry and strategies for challenging continued custody and preadjudicatory detention.

I. ENTRY INTO THE SYSTEM

In Louisiana, children and youth enter the juvenile delinquency system through either (1) arrest; (2) court order or arrest warrant; or (3) service of petition and summons to appear. The way a child or youth enters the system is relevant to challenging the legal sufficiency of the case or probable cause at the forefront. The manner of entry may also provide a basis for a motion to suppress evidence or statements.

1 Barry Holman & Jason Ziedenberg, Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (2006); Bill Rust, *Juvenile Jailhouse Rocked: Reforming Detention in Chicago, Portland, and Sacramento*, AdvoCasey (Annie E. Casey Foundation), Fall 1999–Winter 2000, at 21.

2 Elizabeth Calvin, National Juvenile Defender Center, Legal Strategies to Reduce the Unnecessary Detention of Children (2004).

3 *Standards Relating to Counsel for Private Parties* § 4.1, *in* Institute of Judicial Administration & American Bar Association, Juvenile Justice Standards (1996).

A. Arrest

A child or youth may enter the delinquency system as a result of being taken into custody by a law enforcement or probation officer.[4] The Louisiana Children's Code provides: "A child may be taken into custody pursuant to an order of the court under this Title or pursuant to the laws governing arrest."[5] However, the Code makes clear that taking a child into custody is not truly an "arrest," but is evaluated according to the laws governing arrest in order to determine the validity of the custody.[6] The Louisiana Code of Criminal Procedure defines arrest as:

> [T]he taking of one person into custody by another. To constitute arrest there must be an actual restraint of the person. The restraint may be imposed by force or may result from the submission of the person arrested to the custody of the one arresting him.[7]

In *State v. Fisher,* the Louisiana Supreme Court outlined the criteria for determining whether there has been a custodial arrest:

> Whether a person has been arrested is determined by an objective test; neither the person's subjective impression nor the lack of formality of the arrest resolves the issue. The determination of whether an arrest occurred depends on the totality of the circumstances, but several factors distinguish an arrest from lesser infringements on personal liberty. A prime characteristic of any Fourth Amendment seizure of a person is whether, under the totality of the circumstances, a reasonable person would not consider himself or herself free to leave. Ultimately, whether a person has been arrested depends on circumstances indicating intent to impose an extended restraint on the person's liberty.[8]

In order to perform a legal arrest or taking into custody, an arresting officer must have probable cause to believe that the child committed a delinquent act or violated a condition of her probation or a condition of her release.[9] Probable cause needed to make a full custodial arrest requires more than the reasonable suspicion needed for a brief investigatory stop.[10] Probable cause requires that the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in the belief that

4 La. Child. Code Ann. art. 812(A) & 814 (2006).
5 La. Child. Code Ann. art. 812(A).
6 La. Child. Code Ann. art. 812(B).
7 La. Code Crim. Proc. Ann. art. 201 (2006).
8 *State v. Fisher,* 97-1133 (La. 09/9/98) (citations omitted); 720 So. 2d 1179, 1183; *see also State v. Ruffin,* 448 So. 2d 1274 (La. 1984); *State v. Statum,* 390 So. 2d 886 (La. 1980); *State v. Zielman,* 384 So. 2d 359 (La. 1980); *State v. Kang,* 01-1262 (La. App. 5th Cir. 02/23/04); 866 So. 2d 408, 414; *State v. Peterson,* 03-1806 (La. App. 1st Cir. 12/31/03); 868 So. 2d 786; *In re R.D.,* 99-801 (La. App. 5th Cir. 11/30/99); 749 So. 2d 802; *State v. Miskel,* 95-584 (La. App. 5th Cir. 01/30/96); 668 So. 2d 1299; *State v. Obney,* 505 So. 2d 211 (La. Ct. App. 1987); *State v. Freeman,* 503 So. 2d 753 (La. Ct. App. 1987); *State v. Harriman,* 434 So. 2d 551 (La. Ct. App. 1983).
9 U.S. Const. amend. IV; La. Child. Code Ann. art. 814(A); *see also Lazard v. Foti,* 02-2888 (La. 10/21/03); 859 So. 2d 656, 663 (Johnson, J., dissenting).
10 *In re R.D.,* 99-801 (La. App. 5th Cir. 11/30/99); 749 So.2d 802.

an offense has been committed and that the person being arrested committed the offense.[11]

While laws governing the taking into custody of juveniles mirror those governing adult arrests, there are a number of acts considered unlawful when performed by children, thus subjecting them to juvenile court jurisdiction, but which are not considered crimes under the criminal code. Therefore, children can be taken into custody for some acts for which adults could not be arrested. These acts are generally referred to as status offenses. For example, in *In re Moten,* the Court of Appeals for the Fourth Circuit held that a warrantless arrest of a juvenile who ran away from home and whose parents requested her return was a valid arrest, even though the alleged delinquent act is not a crime for an adult.[12] The court noted that "statutes covering this situation are peculiar to juveniles," and analogized a child's absenting himself from the home to a misdemeanor being committed by an adult in the presence of an officer who may make an arrest without first obtaining a warrant."[13]

In *In re R.D.,* the Court of Appeals for the Fifth Circuit discussed probable cause to believe a child or youth is truant. The court wrote:

> The 1998 Author's Notes to the Louisiana Children's Code Handbook state that because truancy does not create any suspicion that the suspect is armed and dangerous, this article does not authorize a *Terry* protective frisk. However, this comment appears to address only the initial stop for questioning. The comment then addresses the next stage of the process, stating "If the officer's reasonable suspicion escalates to probable cause that the child is violating the compulsory school attendance laws, the officer may take the child into custody."[14]

B. Taking into Custody with Court Order

Another method for taking a youth into custody is use of a court order or arrest warrant. A law enforcement officer, probation officer, district attorney or other person designated by the court can obtain an arrest warrant from the court by presenting a signed and sworn written statement showing probable cause to believe that a child has committed a delinquent act or violated the terms of his probation or release.[15] Arrest warrants are also frequently issued when a child has failed to appear for a scheduled court date after he has been given notice.

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11 *Brinegar v. United States,* 338 U.S. 160, 175-76 (1949) (citing *Carroll v. United States,* 267 U.S.132 (1923)); *State v. Ceaser,* 02-3021 (La. 10/21/03); 859 So. 2d 639, 644.

12 *In re Moten,* 242 So. 2d 849 (La. Ct. App. 1970). The main issue before the court was whether or not entry into a house without a warrant to arrest the juvenile was justified by an exigent circumstance. The court held that it was.

13 *Id.* at 853.

14 *In re R.D.,* 749 So. 2d at 806 (citing McGough & Triche, Louisiana Children's Code Handbook, 1998).

15 La. Child. Code Ann. art. 813.

C. Service of Petition and Summons

A child or youth may also be brought under the jurisdiction of the delinquency system through service of a petition and a summons to appear in juvenile court. The District Attorney may file a petition without leave from the court, but any person authorized by the court may file a petition if there are reasonable grounds to believe that the child is a delinquent child.[16] The child and his parent should be served with a copy of the petition, a right to counsel form and a summons to appear in court.[17]

If the child or youth and parent are properly served with the petition and summons and fail to appear in court at the designated date and time, the court may issue an arrest warrant and order them to be taken into custody and appear before the court.[18]

II. PROCEDURE AFTER ARREST OR SERVICE OF PETITION AND SUMMONS

Once a child has been taken into custody and/or delinquency proceedings have been initiated against him, a number of procedural rules and protections are set in motion. Involvement of a juvenile defender at the earliest possible moment will provide the opportunity to advocate for a young client and ensure that all procedures are followed, and that the client's case is resolved expeditiously and in the manner required by law.

A. Police Practices Following Arrest

1. Procedure After Arrest Without Warrant

If a child or youth is taken into custody without a court order, the arresting officer has two options immediately following the arrest. He can:

1) Counsel the child and release her to the care of her parents; or

2) Promptly escort her to an appropriate juvenile facility.[19]

An appropriate juvenile facility includes a licensed private or public facility for juveniles.[20] The court may not place a child alleged to be delinquent in the custody of the Department of Social Services of the Department of Public Safety and Corrections prior to adjudication, and no child under juvenile court jurisdiction may be held in an adult jail or lockup.[21]

If the officer *does not* release the child following arrest, he must:

1) Promptly notify the child's parents;

16 La. Child. Code Ann. art. 842.
17 La. Child. Code Ann. art. 847 & 850.
18 La. Child. Code Ann. art. 851.
19 La. Child. Code Ann. art. 814(B).
20 La. Child. Code Ann. art. 822(A).
21 La. Child. Code Ann. art. 822(B)-(C).

2) *Immediately* execute an affidavit setting forth the basis for probable cause to believe that the child committed a delinquent act or violated the terms of her probation or parole and submit it to the court for review; *and*

3) Submit a report *within 24 hours* to the district attorney or other officer designated by the court, which includes the child's identifying information, a statement of the circumstances and facts resulting in the arrest, a statement of probable cause, and a statement regarding whether the child was released or placed in a facility.[22]

If the officer releases the child, he must execute a report supporting the arrest to the district attorney within *7 days* from the child's release.[23]

2. Procedure After Arrest with a Warrant or Court Order

If a child or youth is taken into custody pursuant to a court order, the officer taking the child into custody shall:

1) Promptly notify her parents that she has been taken into custody;[24] and

2) Promptly take the child to the appropriate facility.[25]

3. Identification Procedures

The police may photograph or fingerprint a child without a court order if it is alleged that the child committed a felony-grade delinquent act or a misdemeanor-grade delinquent act involving a dangerous weapon.[26] The district attorney must obtain a court order for any other child or youth to be photographed or fingerprinted.[27] The district attorney can also obtain a court order for authorization to use other identification procedures, including a handwriting sample or a lineup.[28]

B. Rights at Arrest

IJA/ABA Standards state that children and youth should, at a minimum, be treated similarly to adults during police investigations into delinquency.[29] Article 808 of the Louisiana Children's Code provides a clear basis for juveniles' rights at arrest, stating: "All rights guaranteed to criminal defendants by the Constitution of the United States or the Constitution of Louisiana, except the right to jury trial, shall be applicable in juvenile court proceedings." The Louisiana Constitution requires a defendant to be advised of the following upon arrest:

(a) The reason for his arrest or detention;

22 La. Child. Code Ann. art. 814(F).
23 *Id.*
24 La. Child. Code Ann. art. 813; *State v. Erven,* 02-36332 (La. App. 2d Cir. 10/23/02); 830 So.2d 368, 376.
25 La. Child. Code Ann. art. 813; *Erven,* 830 So.2d at 376.
26 La. Child. Code Ann. art. 818(A).
27 La. Child. Code Ann. art. 818(B).
28 La. Child. Code Ann. art. 818(C).
29 *Standards Relating to Police Handling of Juvenile Problems* § 3.2, *in* Institute of Judicial Administration & American Bar Association, Juvenile Justice Standards (1996).

(b) His right to remain silent;

(c) His right against self-incrimination;

(d) His right to the assistance of counsel; and

(e) His right to court-appointed counsel, if indigent.[30]

1. Judicial Review of Probable Cause

In cases in which the child was not released following being taken into custody, the court has 48 hours from the time of arrest, including legal holidays,[31] to review the affidavit submitted to the court by the arresting officer to determine if there was probable cause. If the court finds there was no probable cause, the child *shall* be released.[32] If the court finds a basis for probable cause, the child will remain in custody for a continued custody hearing before the court within *3 days* after the child's entry into the juvenile detention center.[33]

2. Role of Defense Counsel at Arrest

Despite a constitutional right to counsel at arrest, most juvenile defenders are not available to children and youth upon arrest unless the youth has previously retained an attorney and notified him of the arrest. In the event that counsel is notified that a client has been arrested, counsel should immediately interview the client and inform her of her rights and pursue any investigatory or procedural steps necessary to protect the client's interests.[34] Juvenile defenders should pursue release from police custody in lieu of detention, diversion from formal juvenile court proceedings and early disposition where appropriate.[35]

30 L.A. Const. art. I, § 13.

31 This means that a probable cause determination must be made by a judge within 48 hours of arrest, with no exceptions or delays for holidays or weekends.

32 La. Child. Code Ann. art. 814(D).

33 *Id.*

34 *IJA/ABA Standards Relating to Counsel for Private Parties, supra* note 3, at § 4.1.

35 *Id.* at •• 6.1-6.3; *see also* National Council of Juvenile and Family Court Judges, Juvenile Delinquency Guidelines; Improving Court Practice in Juvenile Delinquency Cases 67–72 (2005).

[P]retrial detention is an onerous experience, especially for juveniles.[36]

III. DETENTION

A. The Authority to Detain

Children who are detained prior to adjudication suffer separation from parents, siblings and friends. Their education and employment are disrupted, and they are often stigmatized as having gone to jail. Children who receive mental health or other medical services in the community may be unable to receive comparable services at a detention center. Moreover, poor conditions of confinement in detention centers "may result in physical and emotional damage that leaves them worse off than before the system intervened."[37]

In 1984, the United States Supreme Court in *Schall v. Martin* held that pre-adjudicatory, or pretrial, detention is constitutional, provided the purpose of the detention is not punishment.[38] The Court in *Schall* reaffirmed that the Due Process Clause protects juveniles in delinquency proceedings and applied the fundamental fairness analysis to the use of preadjudicatory detention for juveniles.[39] The *Schall* Court addressed two questions: (1) whether the use of preadjudicatory detention served a legitimate state interest; and (2) whether there were sufficient procedural safeguards.[40]

The court found a legitimate state interest for preadjudicatory detention based on three factors: (1) uniformity among the states in allowing pretrial detention of juveniles; (2) the state's legitimate and compelling interest in public safety; and (3) the state's legitimate interest in protecting the juvenile from himself.[41] The Court recognized a juvenile's liberty interest, "in freedom from institutional restraints, even for the brief time involved here," in pretrial detention.[42] However, the Court stated that the juveniles' interest in freedom:

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36 *Moss v. Weaver,* 525 F.2d 1258 (5th Cir. 1976).
37 Sue Burrell, *Improving Conditions of Confinement in Secure Juvenile Detention Centers* (1999), *in* Annie E. Casey Foundation, Juvenile Detention Alternatives Initiative, Pathways to Juvenile Detention Reform, *available at* www.aecf.org/publications/data/6_improving.pdf
38 *Schall v. Martin,* 467 U.S. 253, 263-64 (1984).
39 *Id.*
40 *Id.*
41 *Id.* at 264-66.
42 *Id.* at 265 (citing *In re Gault,* 387 U.S. 1, 27 (1967)).

> must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's "*parens patriae* interest in preserving and promoting the welfare of the child."[43]

The court warned however, "the mere invocation of a legitimate purpose will not justify particular restrictions and conditions of confinement amounting to punishment. It is axiomatic that *'[d]ue process requires that a pretrial detainee not be punished*.'"[44] To ensure that pretrial detainees are not punished courts must decide, "whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose."[45]

Louisiana Children's Code Articles 813 through 822 provide the framework for pre-adjudicatory detention or custody, including how a child or youth should be taken into custody, the type of facility she can be held in, judicial review of police affidavits, judicial hearings on the issue of probable cause and grounds for detention, and the burden of proof for the use of detention and time limitations.[46]

B. The Continued Custody Hearing

If a judge finds probable cause to believe that a child committed a delinquent act or violated the terms of probation or parole, and the child is thereby held in custody, a continued custody hearing must be held within *3 days* after the child's entry into the juvenile detention center.[47] This three-day time period for the continued custody hearing *does not* include weekends or holidays; the hearing may actually be scheduled more than 72 hours after the child was taken into custody.[48]

1. Rights at the Continued Custody Hearing

If a child has not been previously advised, the court shall, at the outset of the custody hearing, advise the child of his right to counsel.[49] It is the burden of the state at the continued custody hearing to prove that there is probable cause that the child has committed a delinquent act or violated a condition of probation or release.[50] A juvenile is entitled to produce witnesses, subject to cross-examination by the state, or to testify on his own behalf and cross-examine the state's witnesses at a continued

43 *Id.* at 265 (quoting *Santosky v. Kramer*, 455 U.S. 745 (1982)).
44 *Id.* at 269 (citing *Bell v. Wolfish,* 441 U.S. 520, 535 (1979)).
45 *Id.*
46 *See In re M.L.W.,* 97-1617 (La. App. 3d Cir. 04/1/98); 709 So.2d 364, 365.
47 La. Child. Code Ann. art. 814(D).
48 *Markley v. Town of Elton*, 02-0528 (La. App. 3d Cir. 10/30/02); 829 So. 2d 1213 (citing La. Child. Code Ann. art. 114).
49 La. Child. Code Ann. art. 821.
50 La. Child. Code Ann. art. 820.

custody hearing.[51] Hearsay evidence is admissible at a continued custody hearing.[52] If probable cause has not been demonstrated, the court shall order the child's release. If probable cause has been demonstrated, the court may order the child's release or may require bail or some other security if determined necessary to secure the child's appearance for subsequent hearings.[53]

2. Role of Defense Counsel at the Continued Custody Hearing

One of the most important roles of juvenile defense counsel is to protect the liberty interests of a young client by guarding against illegal use of detention. The IJA/ABA Juvenile Justice Standards require prompt investigation of the least restrictive form of release, alternatives to detention and immediate preparation for the judicial detention hearing.[54] In addition to zealous advocacy, national standards expect that juvenile defense counsel visit the child or youth while the child or youth is in detention.[55]

3. Preparation for the Hearing

In order to be able to argue for the least restrictive form of release, defense counsel must be prepared to challenge the purpose of detention, present information that would favor release, submit a plan for release and be knowledgeable about alternatives to detention. Defense counsel must prepare for the continued custody hearing to present facts and arguments relating to:

(1) Jurisdictional sufficiency of the allegations;[56]

(2) Legal sufficiency of the allegations;[57]

(3) Diversion of the case;[58]

(4) Detention alternatives;

(5) Criteria used for detention determination;[59]

(6) Noncompliance with procedures for referral to juvenile court;[60]

(7) Noncompliance with conditions for release;[61]

(8) Detention in this case is punishment;[62] and

51 La. Child. Code Ann. art. 821 (codifying *In re Morrison,* 405 So. 2d 246 (La. Ct. App. 1981), which held that a juvenile has the right to call witnesses, testify, present evidence and cross examine state witnesses at the continued custody hearing).
52 La. Child. Code Ann. art. 821(C).
53 La. Child. Code Ann. art. 821.
54 *Standards for the Defense Attorney* § 8.2, *in* Institute of Judicial Administration & American Bar Association, Juvenile Justice Standards: Standards Relating to Interim Status: The Release Control and Detention of Accused Juvenile Offenders Between Arrest and Disposition (1996).
55 *Id.*
56 *Id.*
57 National Council of Juvenile and Family Court Judges, Juvenile Delinquency Guidelines, *supra* note 35, at 65–66.
58 *Id.*
59 *IJA/ABA Standards Relating to Counsel for Private Parties*, *supra* note 3, at Part VI.
60 *Id.*
61 *Id.*
62 *Schall v. Martin,* 467 U.S. 253 (1984).

(9) Appropriateness of the place of detention.[63]

Preparation is key in ensuring that your young client is released from custody. Unfortunately the detention hearing will be held only days after or even on the very day of your appointment to a child's delinquency case. This makes preparation very difficult. A National Juvenile Defender Center guide to preventing unnecessary detention recommends 10 steps to prepare for a detention hearing:

(1) Obtain a copy of the declaration of probable cause or other police reports;

(2) Obtain a copy of your client's juvenile court record;

(3) Meet with your client to discuss the hearing and to prepare your client for conversations with the probation officer. Gain necessary information from your client to support your arguments for release;

(4) Talk with your client's parents or guardian to gain information helpful to your arguments for release; listen to their concerns, if any, about the child's release and try to address them. Advocate for your client with their parents to gain their support for a release plan. Prepare the parents for the hearing—the court will likely want to hear from the parents in making its decision regarding continued custody. Encourage the parents to develop a plan including stricter rules, more supervision, a curfew, etc. to present to the court. The parents' willingness to take responsibility for their son or daughter and impose strict discipline and rules in the home will convince many judges that release pending adjudication will be acceptable;

(5) Talk with the probation officer to discover what they know about the situation and hear their recommendations on detention; learn about their concerns and advocate for your client;

(6) Talk with the prosecutor to gain information about his concerns—and whether he will be recommending detention and why—while advocating for the release of your client;

(7) Assess the likelihood of your client's release by reviewing probable cause findings and police statements, reviewing prior court records and determining whether there is an adult willing and able to supervise the client upon release;

(8) Make a plan for the release of your client;

(9) Identify people who support your client and who could testify on his behalf at the custody hearing or write letters of support;

63 *IJA/ABA Standards Relating to Counsel for Private Parties, supra* note 3, at Part VI.

(10) Gather supporting documents, including letters of support and information about community-based alternative services. Bring copies of supporting documents for you, the judge, the prosecutor, the probation officer and your client and his parents. [64]

It is also important to conduct research about the local detention centers. A defense attorney should know the conditions at the local detention center and which services are offered in each detention center. Attorneys can file Freedom of Information Act ("FOIA") or Public Records Act requests to gather information regarding staffing levels, the number of certified mental health staff, and the number of teachers and their credentials, including special education certifications. FOIA requests may also include information regarding allegations of excessive force, criminal allegations occurring within the facility, copies of staff training guides, discipline guidelines and statistics on the use of discipline.[65] This information may be used for all juvenile clients facing preadjudicatory detention, so this research will not have to be duplicated for each case. Information about conditions problems or lack of resources and services at the local detention center can provide defense attorneys with a basis for an argument that the facility is not appropriate for their clients. An attorney should be familiar with non-detention alternatives in the community, so she can argue for services available outside of the detention center.

When an attorney cannot make the time to meet with her client and prepare adequately for a detention hearing, it may be best to have the detention hearing postponed. This option should be discussed with the client, and every attempt should be made to proceed with a detention or custody hearing as soon as possible. Any decision to delay a detention hearing should be weighed heavily. A delay could be beneficial, in that it will provide more time for preparation and may allow time for parties to "cool off" in cases that are high-profile or have highly emotional facts or witnesses. However, consider that the longer a client stays in detention pending a continued custody hearing, the more detention can be considered the status quo by the court and prosecutor, making it more difficult to argue successfully for release.[66]

4. The Hearing and Probable Cause

The continued custody hearing provides the first opportunity to present a positive picture of the young client. It is also, if adequately prepared for, an opportunity to effectuate the release of the client from custody and to obtain necessary services and supports for a youth and his family.

The initial stage of the continued custody hearing should involve a presentation of evidence by the district attorney that there is probable cause to believe that the child committed the delinquent act alleged or otherwise violated a condition of proba-

64 Calvin, *supra* note 2, at 12–14.
65 *Id.* at 11.
66 *Id.* at 28.

tion or release.[67] The hearing provides the first opportunity to challenge the charges against the youth and to argue that there is not probable cause in the case. While a judge should have made a preliminary determination of probable cause within 48 hours of arrest based on the arresting officer's affidavit, that determination did not involve the presentation of evidence or a contradictory hearing. The continued custody hearing provides an opportunity for both.

To make a determination of probable cause at the custody hearing, the judge must consider whether there is probable cause to believe that the charged offense was committed and the accused committed the offense. Challenges to the arresting officer's affidavit of probable cause submitted to the court are crucial. Such challenges can include that the affidavit was not properly attested to, does not allege firsthand knowledge of the facts supporting the finding of probable cause, that the facts alleged do not support a finding that all of the elements of the crime or delinquent act in question are present, or that the affidavit does not sufficiently tie the client to the crime or delinquent act alleged.[68]

Once probable cause has been established and acknowledged by the court, the custody hearing should address the issue of custody. In Louisiana, the determination made by the judge at this stage is whether to release the child or whether to impose bail. Unless the child is charged with an act that would be considered a capital offense if charged as an adult, the court cannot order continued detention without the possibility of bail. The role of the advocate will then be to present evidence and argue for release of the child without bond or to argue for a reasonable bond.

C. The Right to Bail

Bail serves as a substitute to detention by providing a monetary bond and assurance that a defendant will appear for court.[69] The Louisiana Constitution guarantees the right to bail to all those charged with a non-capital offense.[70] This right extends to juveniles with the same caveat, that a child charged with an act which would qualify as a capital offense in criminal court is not entitled to bail.[71]

The court must set a reasonable bail.[72] A court shall consider the following when determining bail:

(1) The nature and circumstances of the delinquent act;

(2) The weight of the evidence;

(3) The child's prior delinquency record, if any;

67 La. Child. Code Ann. art. 820.
68 Calvin, *supra* note 2, at 7.
69 La. Code Crim. Proc. Ann. art. 311.
70 L.A. Const. art. I, § 18.
71 La. Child. Code Ann. art. 823; *State v. Franklin,* 12 So. 2d 211 (La. 1943).
72 *State v. Jones,* 215 So. 2d 108 (La. 1968); *Ex parte Oliver,* 89 So. 915 (Miss. 1921).

(4) The financial ability of the child and his family to post a money bail; and

(5) The probability of the child's appearance at any scheduled hearing, considering:

a. the child has failed to appear at some previously scheduled hearing;

b. the child has violated a condition of his probation or release;

c. the child has absented himself from home or his usual place of abode without the consent of his parents;

d. the child is habitually disobedient and is ungovernable and beyond the control of his parent;

e. the potential danger of release to the child and to the public as it affects the probability of appearance.[73]

Community safety can also be a factor in determining bail amount.[74] The presumption of innocence protects a defendant from pretrial detention merely for the purpose of punishment, and future dangerousness generally is an impermissible basis for detention. Despite this, evidence that a defendant is a threat to potential witnesses or to the judicial system is permissible grounds for detention and can be a factor in setting the bail amount.[75]

The Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits excessive bail.[76] In *State v. Jones,* the Louisiana Supreme Court held that a bail amount was unreasonable when the amount set by the court was "so excessive, oppressive and completely out of line with all our prior jurisprudence in bail bond cases."[77] The test for determining excessive bail is "whether it has been set higher than reasonably calculated to guarantee the appearance of the accused in court."[78] In the case of indigent clients, the court must consider non-monetary and less financially onerous forms of bail in order to ensure an indigent defendant's appearance at trial.[79] Pretrial freedom cannot be conditioned on a person's wealth.[80]

1. Advocating for a Low Bail

A juvenile defender should always argue for a low bail. Counsel should interview her client and her parents prior to the custody hearing. Arguments in favor of a low bail amount can include: lengthy residence in the community, substantial family ties in

73 La. Child. Code Ann. art. 824.
74 *United States v. Salerno,* 481 U.S. 739 (1987).
75 *Id.*
76 U.S. Const. amend. VIII; U.S. Const. amend. XIV.
77 *Jones,* 215 So. 2d at 110.
78 *Salerno,* 481 U.S. at 739; *Joseph v. Foster,* 382 So. 2d 986 (La. Ct. App. 1980).
79 *Pugh v. Rainwater,* 557 F.2d 1189 (5th Cir. 1977).
80 *Id.*

the community, steady attendance at school and financial resources available to the family. A juvenile defender must have an idea about the child and family's status in the community and their financial status prior to such a hearing. Therefore, initial interviews with the parents must involve questions about income and assets. Many juvenile advocates have also argued that because a child generally has no income of his own and is by nature indigent, the mere status of being a child should be an argument in favor of a low bond or no bond under equal protection grounds. Utilizing this argument may be effective in persuading the judge to set a non-monetary bail which a child and his family can provide and which will effectively insure appearance in court.

2. Types of Bail

The Louisiana Children's Code provides for four types of bail or securities to insure the attendance of a child charged in delinquency proceedings at hearings. They include:

> (1) A deposit for the full amount of the bail bond can be deposited with the clerk with cash or other authorized security. The full amount of this deposit shall be returned upon performance of the bail conditions, generally including attendance at required hearings.
>
> (2) A deposit in the amount of 10%, but not less than $25, or the full bail amount can be deposited with the clerk. Upon performance of the bail conditions, 90% of the deposited amount shall be returned; the clerk retains 10%, or at a minimum $5, for processing fees.
>
> (3) In the best interests of the child and his family, the court may agree to the deposit of some other item of value or other property as a security to ensure the child's appearance for adjudication. The item or property will be returned upon the child's attendance.
>
> (4) The child and his parents may sign a personal bail undertaking in lieu of a surety or deposit.[81]

Flexibility on the courts part to choose from these varying bail types permits space for advocates to argue for a bail that is reasonable for the individual client and his family. The opportunity for a non-monetary bail is key for many indigent clients, and this option should be presented to the court in a creative manner.

81 La. Child. Code Ann. art. 825.

3. Modification of Bail

Once bail is set, the court may for good cause increase or decrease the bail or security on motion of the state, the court, application by the child or his parents or guardian.[82] Any modification of the bond or bail amount in any parish with a population in excess of 490,000 must be preceded by a contradictory hearing.[83]

A district attorney may request a modification to a higher bail amount if, for instance, the child is rearrested or circumstances change in a way that calls for an increased bond. The child may file a motion for a modification of the bail amount if circumstances warrant a decrease of the amount. Juvenile defenders who are appointed after bail was set should consider such motions on behalf of their clients, particularly if there was no advocate in court who argued against the current bail. In addition, if there is a change in circumstances or more information comes to light which favors a lower bail, a motion for modification of bail should be filed.

A child who is refused bail, or who has a challenge of excessive bail, may invoke the supervisory jurisdiction of the courts of appeal.[84] To appeal a modification of bail denial or to challenge an excessive bail, a motion to reduce bail must first be filed before the court with delinquency jurisdiction. If the motion is denied, a supervisory writ may be filed.[85] A challenge of bail must be raised by motion prior to the adjudication and followed by supervisory writ, if the motion is denied, to preserve the bail issue for appeal.[86]

4. Release Orders

When a court authorizes a child's release from continued custody upon deposit of bail or surety, the court must issue an order containing the bail provisions, a statement of the conditions imposed on the child, and the date of the next court appearance. The order must be signed by the child and his parents ensuring that they have notice of the next court date and of the conditions of bail.[87] The court *must* impose the following conditions of release upon the child: (1) that the child appear at the next court proceeding at a specific time and place; and (2) that the child shall not commit any further delinquent acts while released. The court *may* also impose the following conditions of release at its discretion: (1) that the child attend school; (2) that the child voluntarily participate in pretrial drug testing; and (3) any other condition of release that is reasonably related to assuring the child's appearance before the court.[88]

A violation of any condition of release may constitute a breach of the bail agreement and contempt of court.[89] If the nature of the breach is failure to appear before

82 La. Child. Code Ann. art. 830.
83 La. Code Crim. Proc. Ann. art. 342.
84 La. Child. Code Ann. art. 831.
85 *State v. Boyle,* 342 U.S. 1 (1951).
86 *State v. McCloud,* 357 So. 2d 1132 (La. 1978); *State v. Jones,* 332 So. 2d 267 (La. 1976); *State v. Dickerson,* 579 So. 2d 472 (La. Ct. App. 1991).
87 La. Child. Code Ann. art. 827.
88 La. Child. Code Ann. art. 826.
89 La. Child. Code Ann. art. 826, 828.

the court, the breach also constitutes bail jumping, a separate offense punishable by imprisonment.[90] When there is a breach of the bail agreement, the court may order the child and his parents to appear before the court, or the court may order that the child be taken into custody and brought before the court.[91]

If the child's parent or counsel have good cause to believe that the child has or will violate the conditions of the bail agreement in a way that will result in his failure to appear before the court, they may report the breach to the court, surrender the child, and request the revocation of the bail agreement.[92] While the Children's Code permits a child's attorney to make such a report to the court, a juvenile defender continues to be bound by her ethical obligations to zealously represent the interests of her client and to keep her client's confidences. A juvenile defender should avoid reporting matters to the court which could result in her client being held in contempt unless she feels it is absolutely necessary for purposes of representing the client's interests and has the client's permission to do so, or feels compelled to do so by other ethical obligations. A surety obligated under the bail bond may also report to the court if he has good cause to believe that the child has or will violate the conditions of the bail agreement and may apply for an order for the child to be taken into custody.[93]

D. Motion to Release

If the continued custody hearing is not held within three days, the attorney should file a Motion to Release the child from detention immediately. Under such circumstances, the child *shall be released* unless the custody hearing is continued at the request of the child.[94] A Motion to Release should include not only arguments regarding the legal consequences of the State's failure to timely hold the custody hearing, but also persuasive arguments about why detention is inappropriate. This motion provides an opportunity to put a persuasive argument and favorable facts on the record for the client. The motion should include information regarding the family's, or some other responsible adult's, willingness to take custody of the child and to ensure that he attends the next scheduled court hearing. It should also include any favorable information regarding the client's school records, such as good attendance or grades. It is also important to include arguments on the lack of evidence supporting the charges, that the child does not have a history of violence, that the child has not been involved with the juvenile justice system before, and any other favorable

90 La. Child. Code Ann. art. 828(A); *see also* La. Rev. Stat. Ann. § 14:110.1 (2006) (providing that a misdemeanor defendant who jumps bail must not be imprisoned for more than six months or fined more than $500 or both and that a felony defendant who jumps bail must not be imprisoned at hard labor for more than two years).
91 La. Child. Code Ann. art. 828(B).
92 La. Child. Code Ann. art. 828(C).
93 La. Child. Code Ann. art. 828(D).
94 La. Child. Code Ann. art. 819; *see generally Lazard v. Foti,* 02-2888 (La. 10/21/03); 859 So. 2d 656, 664 (Johnson, J., dissenting); *State v. Dawson,* 00-2279 (La. 11/27/00); 775 So. 2d 1046, 1048 (Calogero, C.J., dissenting from denial of writ application); *State v. Hamilton,* 96-0107 (La. 7/2/96); 676 So. 2d 1081; *Markley v. Town of Elton,* 02-0528 (La. App. 3d Cir. 10/30/02); 829 So. 2d 1213, 1214; *State ex rel. Jackson,* 99-2977 (La. App. 4th Cir. 03/22/00); 757 So. 2d 900, 902; *State ex rel. M.L.W.,* 97-1617 (La. App. 3d Cir. 04/01/98); 709 So. 2d 364, 365.

facts that are applicable in the child's case and that would support a determination of release from custody pending adjudication.

E. Appeal of Detention Decisions

If the court orders the child held in continued custody and the basis for the detention is impermissible under the law or a court error, the decision may be immediately appealed through the State's supervisory writ process. A supervisory writ on an issue should be filed immediately following the continued custody hearing determination or following a ruling on a motion to release; otherwise the matter may be waived as moot.

IV. PRACTICE TIPS

Preventing pre-adjudicatory detention is an important duty of a juvenile defender. Not surprisingly, the issue can often be contentious in court and may require creative arguments and an extensive use of litigation skills. The following is a list of arguments and tactics that may be useful in obtaining the release of the client from detention.

A. Effective Arguments If It Is Alleged that the Client Will Likely Fail to Appear for Court[95]

1. Secure adult support

Encourage a parent or guardian to advise the court that she takes the matter seriously, understands the importance of the child being present at court, believes the child understands this, and will personally bring the child to court.

2. Provide evidence that your client is not likely to miss court

The following facts, if applicable, can be persuasive: (1) the child surrendered to the police or probation on his own; (2) he has appeared at prior court hearings; (3) he has kept appointments with counselors and probation officers; (4) he has a stable living situation; (5) he attends school, work, or extracurricular activities regularly; (6) he has peers who are not criminally involved; or (7) he has no delinquency or criminal history.

3. Address previous failures to appear

If the child failed to appear in a previous matter, it may be possible to argue, when appropriate: (1) that the client was younger and less mature; (2) that the child did not have an adequate living situation at the time, but does now; (3) that the child had mental health problems that were not being addressed, but that they are now; (4)

95 Calvin, *supra* note 2, at 17–18.

that the child has learned his lesson from previous incarceration or other conditions imposed for failure to appear; or (5) that the child has since attended court hearings.

4. Address any allegations of an unstable living situation

Respond to allegations of an unstable living situation with arguments such as: (1) the unstable family member is no longer present in the home; (2) the child is mature and able to be responsible for himself; (3) the child has other adults to support him, such as responsible neighbors, friends, siblings, etc.; or (4) the assessment of the instability of the living situation was inaccurate or culturally biased.

5. Address fears or allegations that the youth will run

Arguments to address concerns that the youth will run away include: (1) the youth has not run away before; (2) the youth has not run away in a long time, or that conditions that previously caused him to run away have changed; (3) the child has strong connections in the community, including family, friends, church, and adults who are important to him; (4) the child has not expressed any inclination to run; (5) the child's previous talk of running was caused by the emotional stress of the situation, which should be addressed in ways other than detention.

6. Present an alternative to the detention plan that will make it more likely that your client will return to court and stay out of trouble pending adjudication

Components of the plan may include:

- a written promise from an adult that she will make sure the child comes to court;
- a plan for school attendance, treatment, counseling, curfew, and other restrictions on activities;
- scheduling of appointments to address the child's needs, such as counseling, treatment, tutoring, etc.;
- specific plans for how the youth will get to court including transportation, who will accompany him, etc.;
- creative day reporting mechanisms, such as checking in daily with a probation officer or social worker who promises to alert the court if the client fails to report;
- participation in a day-reporting system through the court;
- request for change of custody to a more responsible family member pending the outcome of the case;
- electronic monitoring;
- placement in an existing day treatment program; or
- placement in a non-secure shelter or youth facility.

Another benefit to a pre-adjudication alternative to detention plan is that if the child is successful with the conditions of release pending the adjudication, then even if found delinquent, it will provide persuasive arguments for a disposition of probation versus incarceration. Counsel can argue that the child cooperated with the pre-adjudication conditions and has a proven ability to obtain necessary and adequate services, and that there is supervision in the community.

One caution: A defender should not advocate for an overload of pre-adjudication conditions of release for the client when they are not necessary to secure his release from detention. This would unnecessarily burden the client with obligations. In addition, an attorney should make sure to assess whether the client and his family will be capable of meeting the conditions set forth. Otherwise, the client is being set up for failure and violation of a court order. Although young clients are generally eager to agree to any level of services and commitments in exchange for their release from jail, they should not be encouraged to agree to conditions that they cannot meet, as failure to comply with the conditions of release will likely result in detention for the remainder of the case and will increase the child's chances of a disposition of incarceration after adjudication of delinquency.

7. Contradict any assertions that your client is dangerous

The attorney should bring forth witnesses who can either state that the youth has not exhibited violent behavior in the past, or who can give specific examples that contradict the dangerousness allegation. The attorney should also present evidence that the child does not have a delinquency history of violent offenses, or that any previous violent behavior was a long time ago, arose out of circumstances that are different from the present circumstances, or were caused by a mental illness which was previously untreated, but is now being treated. Finally, the attorney should argue that the client has matured since the prior dangerous behavior.

B. Address Problems with the Detention Center

An attorney may advocate for the release of a client from detention and for no or limited bail by presenting information regarding deficiencies of the detention center or the lack of available services for the child. The arguments can include:[96]

> 1) The detention center has limited or no access to services that the client needs, such as special education services, adequate counseling, psychological/psychiatric services, or adequate mental health care.
>
> 2) The detention center cannot provide the basic needs of the child because it is overcrowded, violent, or unsanitary, fails to provide freedom to practice religion, will affect the child's ability to stay caught up with school, or limits access to counsel and evaluations for his case.

96 Calvin, *supra* note 2, at 21–22.

C. Alternatives to Detention

It may be helpful in arguing against pre-adjudicatory detention to present to the court a detention plan showing that needed services can be obtained in the community. Advising the court of a variety of alternatives to holding a child in a secure care facility will encourage a creative solution. These alternatives can include:[97]

- A set daily schedule with fixed locations and times;
- Attendance at treatment, counseling sessions, or school programs;
- A curfew;
- Informal daily reporting or checking in with a probation officer or other person;
- Restrictions regarding contacts with particular people, such as co-defendants, the victim, or others involved in the criminal or delinquency system;
- Required presence of an adult at all times;
- Electronic monitoring;
- Nights-only detention, so the child can attend regular school or work during the days;
- Weekend-only detention;
- Spending the day at a detention school or other programming, but returning home each night;
- Home detention;
- Placement with a family friend or relative;
- Placement in a foster home;
- Placement in a non-secure treatment facility, group home, or shelter; or
- Detention with an agreed time for court review, if factors change.

In less serious cases, an oral presentation of a release plan can be offered. However, in more serious cases, it is advisable that a release plan be presented to the court in writing.[98] If possible, it is also helpful to present witnesses, such as social workers or staff from agencies or programs that have agreed to work with the child, to explain the benefits of the plan.

If there are no adequate community services available, some courts may be more inclined to remand a client in custody so that he can receive services. This should be argued against. Detention simply for the purpose of providing services is not appro-

97 *Id.* at 22.
98 *Id.* at 22.

priate nor allowed by law.[99] The court should be encouraged to order that private or alternative services be provided. Arguing against the inappropriate use of detention may also encourage and pressure the community to develop alternative community services.

V. CONCLUSION

Preventing pre-adjudicatory detention is vitally important to a child's delinquency case, and to the future of the child. Early case involvement, careful preparation, and zealous advocacy at a continued custody hearing is the cornerstone of quality delinquency representation.

99 *Id.* at 31.

CHAPTER 10

MENTAL INCAPACITY TO PROCEED

Despite an attorney's best efforts to communicate with her client, sometimes it becomes clear that the client does not understand or is unable to assist the attorney in the manner necessary for the attorney to provide quality defense services. If the child does not understand the role of his attorney, cannot communicate with the attorney regarding his case, does not seem to understand the proceedings, or is unable to participate in the court process, the child may lack the mental capacity to participate in his defense.

A person incapable of understanding and participating in the court process does not benefit from the constitutionally mandated rights associated with a fair trial. The United States Supreme Court has repeatedly held that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is incompetent to stand trial.[1] The right not to be tried while incompetent is a fundamental right in juvenile proceedings.[2]

Counsel representing youth facing delinquency allegations are in a position to make a preliminary inquiry into a child's competence to determine whether questions of competency, or mental capacity, should be raised in court. This chapter will provide an explanation of the legal concept of competency, suggestions regarding how to determine whether the child's competency should be a concern, a discussion of ethical issues related to raising competency in court, a step-by-step explanation of the competency process in juvenile court, and practice tips regarding litigating competency issues.

I. WHAT IS COMPETENCY AND MENTAL CAPACITY?

Mental capacity and competency are synonymous legal principles that relate to a child's ability to understand and participate in the court process. Although Louisiana statutes refer to capacity, many court decisions, advocates, and court personnel use both terms interchangeably.

The concept of competency, or capacity, is based on well-settled federal and state law, which provides that a person cannot be tried for a criminal act if he "lacks the capacity to understand the nature and object of the proceedings against him, to consult

1 *Cooper v Oklahoma,* 517 U.S. 348, 354 (1996); *Medina v. California,* 505 U.S. 437, 453 (1992); *Drope v. Missouri,* 420 U.S. 162, 171-72 (1975); *Pate v. Robinson,* 383 U.S. 375, 378 (1966).
2 *State v Causey,* 363 So. 2d 472, 476 (La. 1978).

with counsel, and to assist in preparing his defense."[3] The rationale is that a person lacking such capacity is unable to avail himself of the rights guaranteed defendants in the criminal justice system. In *Riggins v. Nevada,* Justice Kennedy wrote:

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.[4]

The right not to stand trial while incompetent has been held sufficiently important to merit protection, even if the defendant has failed to make a timely request for a competency determination.[5] The issue may be raised at any stage of the proceedings, even after conviction or adjudication.[6]

The seminal United States Supreme Court case, *Dusky v. United States,* sets forth the legal test for determining competency: "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."[7]

The Louisiana Supreme Court, in *State v. Bennett,* elaborated on the *Dusky* test and set forth a number of factors for courts to consider in making a determination of competency; specifically, if the defendant is fully aware of the nature of the proceedings and able to assist in his defense.[8] These factors, also referred to commonly as the "Bennett criteria," are as follows:

- Whether the defendant understands the nature of the charge and can appreciate its seriousness;
- Whether the defendant understands what defenses are available;
- Whether the defendant can distinguish a guilty plea from a not guilty plea and understand the consequences of each;
- Whether the defendant has an awareness of his legal rights;
- Whether the defendant understands the range of possible verdicts and the consequences of conviction;

3 *State v. Bennett,* 345 So. 2d 1129, 1136 (La. 1977) (quoting *Drope v. Missouri,* 420 U.S. 162, 171 (1975)).
4 *Riggins v. Nevada*, 504 U.S. 127, 139–140 (1992) (Kennedy, J., concurring) (citing *Drope v. Missouri,* 420 U.S. 162, 171–172 (1975)).
5 *See Pate v. Robinson*, 383 U.S. 375, 384 (1966) ("[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial.") (citing *Taylor v. United States,* 282 F.2d 16, 23 (8th Cir. 1960)).
6 *State v. Luquette,* 275 So. 2d 396 (La. 1973); *State v. Gunter,* 23 So. 2d 305 (La. 1945); *State v. Allen,* 15 So. 2d 870 (La. 1943).
7 *Dusky v. United States,* 362 U.S. 402, 402 (1960) (per curiam).
8 *Bennett,* 345 So. 2d at 1138.

- Whether the defendant is able to recall and relate facts pertaining to his actions and whereabouts at certain times;
- Whether the defendant is able to assist counsel in locating and examining relevant witnesses;
- Whether the defendant is able to maintain a consistent defense;
- Whether the defendant is able to listen to the testimony of witnesses and inform his lawyer of any distortions or misstatements;
- Whether the defendant has the ability to make simple decisions in response to well-explained alternatives;
- Whether, if necessary to the defense strategy, the defendant is capable of testifying in his own defense;
- Whether and to what extent the defendant's mental condition is apt to deteriorate under the stress of trial.[9]

The criteria should be considered in light of the apparent abilities of the client before making a determination to raise competency in court. Defense counsel must force the court to follow these guidelines instead of generally accepted attitudes about competence and criminal culpability. For instance, a defendant's ability to understand right from wrong is totally irrelevant to a determination of competency to stand trial, even though it may be relevant in determining criminal liability.[10] Despite a good understanding regarding some of the Bennett criteria, such as the nature and seriousness of the charges, if a client is unable to assist his counsel by providing facts or making decisions about his case, he is effectively incompetent and incapable of assisting in his own defense. A competent client must have the ability to consult with his lawyer with a reasonable degree of rational understanding *and* must have a rational *and* factual understanding of the proceedings against him.[11]

Furthermore, competency is a legal standard, not a psychiatric or psychological one. Although mental health professionals will be appointed to evaluate any defendant or juvenile respondent when competency concerns are raised, these professionals are not charged with or capable of making a determination of the child's competence to stand trial. "Like criminal responsibility, incompetency is a legal question; the ultimate responsibility for its determination must rest in a judicial rather than a medical authority."[12]

The Louisiana Supreme Court has repeatedly recognized a defendant's right not to be tried if incompetent,[13] and the Louisiana General Assembly codified this right in

9 *Id.*
10 *Id.* at 1137.
11 *Dusky*, 362 U.S. at 402.
12 *Bennett,* 345 So. 2d at 1137 (quoting Note, *Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 470 (1967)).
13 *Bennett,* 345 So. 2d at 1139; *State v. Morris,* 340 So. 2d 195, 203 (La. 1976); *State v. Augustine,* 215 So. 2d 634, 638-39 (La. 1968).

the Louisiana Code of Criminal Procedure,[14] which provides that "[m]ental incapacity to proceed exists when, as a result of mental disease of defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense."[15]

The Louisiana Children's Code elaborates on procedures regarding mental incapacity to proceed in delinquency proceedings.[16] While the Code of Criminal Procedure only considers whether a defendant lacks capacity due to a mental disease or defect, under the Children's Code "'mental incapacity to proceed' means that, as a result of mental illness *or developmental disability*, a child presently lacks the capacity to understand the nature of the proceedings against him or to assist in his defense."[17]

The definition was expanded in 2004 to incorporate principles of childhood development by including developmental disabilities in the definition of mental incapacity.[18] This makes the definition of competency in delinquency cases distinct from that set forth by the Code of Criminal Procedure.

Pursuant to the Louisiana Children's Code, a child's mental incapacity to proceed may be raised at any time by the child, the district attorney, or the court.[19] Once a question of competency is raised, all further delinquency proceedings must stop until the child is deemed competent by the court.[20] Regardless of who raises the issue, the juvenile respondent has the burden to prove that he is not competent by a preponderance of the evidence.[21] Additionally, the juvenile defender has the role of ensuring that the court adheres to proper standards, that competency evaluations are completed properly and that the child's right not to be adjudicated if incompetent is protected.

II. ASSESSING WHETHER YOUR CLIENT IS COMPETENT

Determining whether a juvenile client is competent is difficult and may not be possible without the help of experts. As discussed in earlier chapters, children and adolescents may have difficulty navigating and understanding the juvenile justice system and developing a relationship with their attorney. Many natural developmental behaviors may make it difficult to assess whether the issue is competency or lack of cooperation or trust. For instance, a child who refuses to respond to questions

14 La. Code Crim. Proc. Ann. art. 641–649.1.
15 La. Code Crim. Proc. Ann. art. 641.
16 La. Child. Code Ann. art. 832–838.
17 La. Child. Code Ann. art. 804(7) (emphasis added).
18 The 2004 amendment to the definition of "mental capacity to proceed" in the Children's Code is consistent with the findings of the MacArthur Juvenile Adjudicative Competence Study, which found that: "Deficiencies in risk perception, as well as immature attitudes toward authority figures, may undermine competent decision making in ways that standard assessments of competence to stand trial do not capture." *See infra* note 23.
19 La. Child. Code Ann. art. 832.
20 *Id.*
21 *State v. Bennett,* 345 So. 2d. 1129, 1138 (La. 1977).

with more than "yes," "no" or a shrug may not be capable of answering questions, or may just be distrustful or exhibiting what many commonly refer to in teenagers as an "attitude." The key to analyzing competence is to utilize all of the skills outlined in Chapter 7 of this manual on developing a relationship with the client. An attorney may have to spend considerable time with the client building rapport and trust by thoroughly explaining the court process and answering questions. With clients who are reluctant to speak, it may take a lot of time and patience to assess actual ability.

Many child clients do not understand the court process simply because it is new to them, or no one has ever explained it in a way that they understand. The job of a juvenile defender is to make efforts to educate the child about the court process and the role of the defender, district attorney, judge and probation officer. The defender must explain the concept of pleas and the consequences of an admission or denial of charges.[22] Very few juvenile clients will know and understand all of these concepts. An effective attorney will use the initial interviews to explain key concepts and procedures to her client. In subsequent meetings with the client, she will ask questions about these concepts and procedures to see if her client retained any knowledge. Open-ended questions allow the attorney to assess whether the client understands the concepts and has not simply memorized the definitions given to him in the last meeting.

A child can lack capacity to proceed for a number of reasons. The child may have a mental illness which affects his ability to communicate and understand concepts. A developmental disability may hinder certain skills needed to participate in a delinquency case. Additionally, the child may simply be too young and immature to be able to comprehend a complicated court process. The MacArthur Juvenile Adjudicative Competence Study, released in August 2002, found:

> [C]ompared to adults, a significantly greater proportion of juveniles in the community who are 15 and younger, and an even larger proportion of juvenile offenders this age, are probably not competent to stand trial in a criminal proceeding. Juveniles of below average intelligence are especially at risk of being incompetent to stand trial.[23]

Studies conducted on children and competency to stand trial suggest that the following factors represent increased risks of poor capacity among adolescents: (1) the juvenile is 13 years old or younger; (2) past history or observations indicate the possibility of emotional disturbance, mental illness, or mental retardation; (3) records indicate the possibility of below average intellectual functioning or a learning disability; or (4) the child exhibits behavior suggesting deficits in memory, attention, or other cognitive functions.[24] Capacity does not have to be raised if any of these factors exist, but these factors alert the attorney to pay careful attention to the child's competency.

22 Thomas Grisso, *The Competence of Adolescents as Trial Defendants,* 3 Psychol. Pub. Pol'y & L. 3, 22 (1997).
23 John D. & Catherine T. MacArthur Foundation, *The MacArthur Juvenile Adjudicative Competence Study Summary* 3 (March 2002), *available at* www.mac-adoldev-juvjustice.org/competence%20study%20summary.pdf.
24 Grisso, *supra* note 22, at 23.

Once the attorney determines that competency may be an issue for her client, it is helpful to obtain additional information regarding the capabilities of the client from your client and his parents, as well as from school and psychological records.

An attorney should obtain an initial competency evaluation from social workers or other trained mental health professionals for another opinion regarding the child's capacity before raising the issue in court. An attorney should consider raising competency if efforts to educate the client and build rapport fail, and the information gathered from other sources support the conclusion that the client lacks the capacity to proceed.

III. ETHICAL IMPLICATIONS OF RAISING COMPETENCY

There is some debate among juvenile justice advocates regarding the duty of a juvenile defender to raise competency issues in court. The rules of professional conduct suggest that if there is a question of competency regarding a client facing delinquency or criminal charges, the matter must be brought to the attention of the court. Other advocates argue that in cases involving minor charges with minimal consequences, it is more of a hardship and burden on a client to raise the issue before the court. Still others argue that it should be the child's decision whether to raise competency. "Ultimately, the decision to ask for a competency evaluation implicates the attorney's ethical and legal responsibilities."[25]

The ABA Criminal Justice Mental Health Standards provide that "defense counsel should move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence."[26] The standards also provide that an attorney may raise competency concerns over the objection of his client but should advise the court and the district attorney of the facts that have given rise to the "good faith" doubt about competency.[27] This may require the attorney to disclose information that would normally be protected by the attorney-client privilege.[28]

The Model Rules of Professional conduct provide that a lawyer "shall abide by the client's decisions concerning the objectives of representation and...shall consult with the client as to the means by which they are to be pursued."[29] The question that remains is whether raising competency is an "objective of representation" and thus subject to the client's decision or whether it is a legal tactic left to the discretion of the attorney. Whether to abide by the client's decision on raising competency is also complicated by the fact that a client with questionable capacity probably lacks the

25 Lynda E. Frost & Adrienne E. Volenik, *The Ethical Perils of Representing the Juvenile Defendant Who May Be Incompetent*, 14 Wash. U. J. L. & Pol'y 327, 343 (2004).
26 ABA Criminal Justice Mental Health Standards 7-4.2(c) (1989).
27 *Id.*
28 Frost & Volenik, *supra* note 25, at 344.
29 Model Rules of Professional Conduct § 1.2 (2002).

ability to provide a well-reasoned decision regarding whether competency should be raised.[30]

Another factor to consider is whether failure to raise competency constitutes ineffective assistance of counsel. Courts addressing competency of adults have found that failure to raise the issue can rise to the level of ineffective assistance of counsel.[31] The Louisiana Children's Code does not mandate that competency be raised but states that it "may" be raised.[32] This implies that under Louisiana statutory law, it is not required that counsel for a child raise competency when there is concern on the issue. However, the ethical implications of failure to raise competency should be weighed against the client's wishes and evaluated on a case-by-case basis.

IV. PROCEDURE UPON RAISING COMPETENCY

As stated earlier, the Louisiana Children's Code provides that a concern regarding a child's mental capacity to proceed may be raised *at any time* by the child, district attorney, or the court.[33] Once raised, there can be no further steps in the delinquency proceeding, except for the filing of a petition, until counsel is appointed to represent the child *and* the child is found by the court to have the mental capacity to proceed.[34] The Children's Code is clear that the delinquency case must come to a halt once competency is raised, regardless of the procedural status of the case. This means that even if a question of competency is raised after the adjudication, the case must stop until a determination has been made by the court that the child is competent.

The Children's Code sets forth the procedures that must be followed once competency is raised. First, the normal delinquency case will be suspended. Then the child, his attorney and the court will be involved in procedures to determine whether the child is competent or incompetent. These procedures provide for the manner and nature of competency evaluations and reporting, qualification requirements for competency evaluators, guidelines for competency hearings, consequences if incompetence is found, and custody and competency restoration options.

In most cases, the juvenile defender will raise issues of competency for his client. While the Children's Code does not require a written motion for the issue to be raised, such a method is preferable so that the relevant issues can be set forth in writing and preserved for the record. Regardless of the manner of raising the issue, it is important to state a basis for your concerns on the record. This will assure the court that you are raising the issue in good faith and not just to delay proceedings. In addition, raising specific concerns regarding a client's capacity under the Bennett

30 Frost & Volenik, *supra* note 25, at 345.
31 *Id.* at 346.
32 La. Child. Code Ann. art. 832.
33 *Id.*
34 *Id.*

criteria will guide the evaluators and the court in the assessment of the child's competency.

If the issue of competency is raised in a case in which a child does not yet have an attorney appointed to represent him, the court shall appoint counsel to represent the child. This must be done before any further steps are taken to even determine competency.[35]

A. Mental Examinations

After competency has been brought to the attention of the court, "the court shall order a mental examination of the child when it has reasonable ground to doubt the child's mental capacity to proceed."[36] In addition to the mental examinations ordered by the court, the child or the district attorney has the right to obtain an additional independent mental examination by a physician of his choice. This physician must be given reasonable access to the child for purposes of the examination.[37]

1. Sanity Commission

The mental examinations are performed by a sanity commission appointed by the court within seven days after the examinations are ordered.[38] The sanity commission is charged with examining the child and reporting back to the court regarding the mental condition of the child. The sanity commission must consist of at least two, and no more than three, physicians licensed to practice medicine in Louisiana. Each physician appointed under the sanity commission must have been in the actual practice of medicine for not less than three consecutive years immediately preceding the appointment. Only one member of the sanity commission can be the coroner or his deputies.

A psychologist licensed to practice psychology in Louisiana can serve on the sanity commission in lieu of one of the physicians. If a suspicion regarding a child's mental illness or developmental disability is raised, at least one of the members of the sanity commission must be a psychologist. In addition, if the physicians appointed to the commission determine that psychological testing is needed, the commission shall apply to the court to appoint a psychologist. Any psychologist appointed must have been engaged in the practice of clinical or counseling psychology for not less than three consecutive years immediately preceding the appointment. All members of the sanity commission must have expertise in child development specific to severe chronic disability of children attributable to intellectual impairment, and must be qualified by training or experience in the forensic evaluation of children.[39]

As is evident from the requirements laid out for the sanity commission, it is good practice for each commission to have a psychologist. Only psychologists are quali-

35 La. Child. Code Ann. art. 833(A).
36 *Id.*
37 La. Child. Code Ann. art. 833(B).
38 La. Child. Code Ann. art. 834.
39 *Id.*

fied to conduct certain essential testing. The child's advocate should recommend a psychologist for the sanity commission when the commission is being appointed. In addition, it is a good idea to become familiar with the physicians, including local psychiatrists, and psychologists who meet the requirements for serving on a sanity commission and who have reputations for providing quality competency evaluations. The attorney should advocate for qualified sanity commission members and object to any members recommended by the court or the district attorney who are unqualified.

2. Sanity Commission Report

A sanity commission appointed by the court has 30 days to conduct an evaluation of the child and file a report with the court. Copies of the report must be sent to all counsel of record in the case.[40] The report shall include the following:

> (1) The reason for the evaluation, if known;
>
> (2) The evaluation procedures used, including any psychometric tests administered, records reviewed, and identity of any persons interviewed;
>
> (3) Pertinent background information, including history of school performance, previous psychiatric history, and family history;
>
> (4) Results of mental status examination, including any psychometric testing administered;
>
> (5) A description of any psychiatric symptoms or cognitive deficiencies, including a diagnosis, if one has been made;
>
> (6) A description of the child's abilities and deficits in the following mental competency functions, coupled with the reasons therefore:
>
> (a) Understanding and appreciation of the nature and object of the proceedings
>
> (b) Comprehension of his situation in relation to the proceedings
>
> (c) Rendering assistance to defense counsel in preparation of the case.
>
> (7) An opinion regarding whether, as a result of mental illness or developmental disability, a child presently lacks the capacity to understand the nature of proceedings against him or to assist in his defense; and
>
> (8) Recommendations for modifications to court procedures which may help compensate for mental competency weaknesses.[41]

If the sanity commission determines that the child should not be considered to possess mental capacity, the report shall also include a prognosis regarding the prob-

40 La. Child. Code Ann. art. 835(A).
41 La. Child. Code Ann. art. 835(B).

ability that the child will attain mental capacity to proceed in the foreseeable future and recommendations for the types of remediation necessary for the child, such as competency restoration services.[42] "The report *shall not* include any statement of the child relating to the alleged offense, and no such statement may be used against the child in court proceedings on the offense."[43]

B. Determination of Mental Capacity to Proceed

Whether a child has the mental capacity to proceed is ultimately determined by the court in a contradictory hearing.[44] The report of the sanity commission is admissible as evidence at the hearing and the members of the sanity commission may be called as witnesses by the court, the child, or the district attorney and may be subject to cross-examination by any party, even the party who called them. In many courts, it is common for all parties to stipulate to competency or incompetency based on the findings of the sanity commission. Other evidence pertaining to the child's capacity to proceed may also be introduced at the hearing by either party.[45]

As mentioned earlier, the child has the burden to prove to the court that he is incompetent. When an attorney concludes that a client is not competent to proceed, yet the sanity commission's conclusions are that the child has such capacity, the attorney must make the case to the court and argue for a finding of incompetency. The court is the ultimate arbiter of whether a child is competent, not the members of the sanity commission. The attorney should vigorously examine sanity commission members using the Bennett criteria and address their methodology and conclusions. If needed, they should present an independent expert who has also evaluated the client.

If, after the contradictory hearing, the court determines that the child has the mental capacity to proceed, the delinquency case resumes from the point at which the issue of competency was raised.[46] If the court determines that the child lacks the mental capacity to proceed, the proceedings remain suspended and the court may order any of the following:

> (a) Dismiss the petition for good cause in accordance with Article 876.
>
> (b) Adjudicate the child's family to be in need of services (FINS) and proceed to a disposition in accordance with FINS guidelines.[47]
>
> (c) Commit the child to the Department of Health and Hospitals, a private mental institution, or an institution for the mentally ill in accordance with Department of Health and Hospitals policy, *if the court finds that the child*

42 La. Child. Code Ann. art. 835(C).
43 La. Child. Code Ann. art. 835(D) (emphasis added).
44 La. Child. Code Ann. art. 836(A).
45 La. Child. Code Ann. art. 836(B).
46 La. Child. Code Ann. art. 837(A).
47 FINS disposition procedures are outlined in Chapter 12 of Title VII of the Louisiana Children's Code. La. Child. Code Ann. art. 777 et seq. (West 2006).

is dangerous to himself or others. The court may also order competency restoration services for the child.

(d) Place the child in the custody of his parents or other suitable person or private or public institution or agency under such terms and conditions as is deemed in the best interests of the child and the public, which conditions may include the provision of outpatient services by any suitable public or private agency. The court may order competency restoration services for the child.[48]

Note that the Children's Code does not provide for the continued detention of a child found incompetent in a detention center or secure facility. When the court finds that the child is a danger to himself or others and lacks capacity to proceed, it may place the child in a mental institution or in the custody of the Department of Health and Hospitals only. The Children's Code further provides that a commitment ordered for a child found incompetent cannot exceed the maximum disposition that the child could receive if adjudicated delinquent for the alleged delinquent act.[49] The juvenile defender must guard against inappropriate placement of a client who is found incompetent.

If a child is placed in the custody of the Department of Health and Hospitals or a private entity and they determine that the child will not attain the capacity to proceed with his adjudication in the foreseeable future, the court shall, within a reasonable time and after at least 10 days' notice to the district attorney and the counsel for the child, conduct a contradictory hearing. The hearing is convened to determine whether the child is and will, in the foreseeable future, be incapable of standing adjudication and whether he is a danger to himself or others.[50] If the court determines that the child will not regain competence in the foreseeable future and that he may be released without causing a danger to himself or others, the court may:

(1) Dismiss the petition for good cause in accordance with Article 876;

(2) Adjudicate the child's family to be in need of services (FINS) and proceed to a disposition in accordance with FINS provisions; or

(3) Place the child in the custody of his parents or other suitable person or private or public institution or agency under such terms and conditions as is deemed in the best interests of the child and the public, which conditions may include the provision of outpatient services by any suitable public or private agency.[51]

If the court determines that the child is unlikely in the foreseeable future to be capable of proceeding *and is dangerous to himself or others* or gravely disabled as a

48 La. Child. Code Ann. art. 837(B).
49 La. Child. Code Ann. art. 837(C).
50 La. Child. Code Ann. art. 837(D).
51 La. Child. Code Ann. art. 837(E).

result of mental illness, the court shall order commitment to a designated and medically suitable treatment facility.[52] Such a judgment shall constitute an order of civil commitment as provided in Title XIV of the Children's Code on the civil commitment of children.[53] Under no circumstances shall a child found to lack the mental capacity to proceed be held in a secure placement facility longer than permitted elsewhere by the Children's Code for a mentally ill or developmentally disabled child.[54]

If, after commitment, the Department or superintendent of the mental institution determines that the child has attained competency and reports to the committing court that the child presently has the mental capacity to proceed, the court shall hold a contradictory hearing within 30 days on this issue of competency, appoint counsel to represent the child if the child no longer has counsel, and order a sanity commission to conduct a new mental examination.[55] The same requirements and procedures for the sanity commission outlined above apply.

The district attorney or the child may also apply to the court to have the proceedings resume on the ground that the child presently has the mental capacity to proceed. Upon receipt of such an application, the court shall order a mental examination by a sanity commission according to the procedures outlined above. The court may also order the Department or superintendent of the mental institution where the child is committed to make a report as to the child's course of treatment and current mental status. The court shall hold a contradictory hearing to determine if the child presently has the mental capacity to proceed.[56]

Once an issue regarding the child's change in competency status is brought to the attention of the court, the initial competency process is repeated. If the court determines that the child has the mental capacity to proceed, the proceedings shall be promptly resumed. If the court determines that the child still does not have the mental capacity to proceed and is unlikely to attain capacity in the foreseeable future, the court can:

> (1) Dismiss the petition for good cause in accordance with Article 876;
>
> (2) Adjudicate the child's family to be in need of services (FINS);
>
> (3) Place the child in the custody of his parents or other suitable person or private or public institution or agency under such conditions as are deemed in the best interest of the child and the public. These conditions can include the provision of outpatient services; or

52 La. Child. Code Ann. art. 837(F). *See* La. Child. Code Ann. art. 1404(3) ("'Dangerousness to others' means the condition of a person whose behavior or significant threats support a reasonable expectation that there is a substantial risk that he will inflict physical harm upon another person in the near future."); La. Child. Code Ann. art. 1404(4) ("'Dangerousness to self' means the condition of a person whose behavior, significant threats, or inaction supports a reasonable expectation that there is a substantial risk that he will inflict physical or severe emotional harm upon his own person.").

53 *See* La. Child. Code Ann. art. 1401 et seq.

54 La. Child. Code Ann. art. 837(H).

55 La. Child. Code Ann. art. 838(A).

56 La. Child. Code Ann. art. 838(B).

(4) If the court determines that the child is dangerous to himself or others, the court shall order commitment to a suitable medical treatment facility in accordance with the provisions governing the civil commitment of children (Title XIV of the Children's Code).[57]

V. PRACTICE TIPS

As mentioned earlier in this chapter, it is the burden of the child to prove to the court that he lacks the capacity to proceed. The role of the child's attorney is to advocate for a finding of incompetency when appropriate. The attorney must also guard against ineffective sanity commission reports and inappropriate placements and treatments for the client and to hold the court accountable for its obligations under the provisions of the Children's Code regulating competency procedures.

A. Challenging Problematic Court Practices

Some courts have fallen into bad habits when handling competency issues. For example, some courts order placement with the Department of Health and Hospitals and request hospital placements for any child found incompetent. This is inappropriate on many levels. First, the Children's Code provides for placement only when there are issues of dangerousness. The attorney should make sure to ask sanity commission members during cross-examinations whether they have made an actual assessment of the child's dangerousness and obtain specifics regarding what that assessment entailed. If they have not, the attorney should object to any opinions they give regarding the child's dangerousness. As an advocate for the child, the attorney should argue that without a showing of dangerousness, there is no basis for out-of-home placement for the child. In some cases, it may be necessary to request an additional evaluation specific to the issue of dangerousness.

Second, although a placement with the Department may be appropriate, that does not automatically mean placement in a hospital is appropriate. Children who do not suffer from psychiatric problems do not need to be hospitalized. The Department has alternative placement options, including group homes and other non-secure, non-hospital facilities that are equipped to house children and provide competency restoration services. The attorney should object to the placement of any child in a hospital when there is no basis for such a placement. Counsel should cross-examine sanity commission members on this issue and possibly produce an independent expert in support of an argument against hospitalization or other inappropriate placements.

Another common court practice is to make a determination of competency based on the written reports of the sanity commission and without a contradictory hearing. If the sanity commission reports are unanimous in their opinions that the child lacks the capacity to proceed and the attorney and the client are comfortable with this

57 La. Child. Code Ann. art. 838(D).

finding, it is probably not worth objecting to this practice. However, if there is any dispute or if the findings suggest that the child is competent, and the attorney and the client disagree with that finding or feel it is not in the client's interest to concede to the finding, it may be essential to demand a contradictory hearing so that the sanity commission members can be examined regarding their findings, and so other information can be presented to the court regarding the child's capacity.

On occasion, a sanity commission member will go above and beyond his obligation by including a diagnosis of the child or by including findings unrelated to a determination of competency in his report. At times, these findings may be detrimental to the client's case. In these situations, counsel should question the sanity commission members regarding their responsibilities as a member of the sanity commission and to challenge any findings that are harmful to the client and not warranted by their role. For instance, a sanity commission member may write in his report that a client has a psychopathic personality and is a career criminal. Counsel should challenge him on record, so the judge will not be persuaded by this statement at adjudication or disposition. After researching the proper professional standards for making such a determination, counsel should question the sanity commission member regarding his improper assessment and methodology in making the assessment. The examiner should have been focused on determining whether the client had skills related to capacity, not whether the child has a tendency toward criminal activity in the future. In some situations, this may also require that counsel engage another expert witness to combat the findings

B. Working with the Sanity Commission

Working with the sanity commission appointed to a client's case is a necessary part of advocacy. The commission is a potential ally and witness for the client, but also a potential adversary. There are certain steps that an attorney can take to help ensure that the commission serves its purpose and addresses the issues important for the client's case. First, the attorney should make contact with the commission members as soon as they are appointed in order to introduce herself and provide relevant background information about her client. The commission members will want to know why competency was raised in the case. The attorney should, either in a letter to the commission or by sending a copy of the motion raising competency issues, explain to the members the specific issues that caused a question regarding the competency of the child. The attorney should be careful not to share confidential information that would be harmful to her client. If another party raised the issue, the attorney should attempt to summarize the issue as was raised by that party.

Background information about the client is helpful to the commission members. An attorney should include in correspondence with the commission a method of contacting the child's parents or guardian and encourage them, after first advising the parents, to contact the parents regarding the child's abilities and background. It is also helpful to send commission members past mental health records and school records which address mental illnesses or disabilities. Again, it is not advisable to send the members information that may be harmful to the client and is not relevant

to competency. However, the more information the attorney provides the commission members, the more thorough their assessment can be.

C. Preparing Your Client

Once the sanity commission has been appointed, the attorney should meet with the client to explain the process and advise the client that she will be meeting with some doctors who will be asking her a lot of questions about her life and the court case. The attorney should advise the client that the information she gives the doctors is not confidential and may be shared with the court, but that she should be as honest with them as possible so that they can do their job. While the sanity commission will be reporting to the court, their report cannot contain any statement of the child relating to the offense, and no such statement can be used against the child in proceedings on the offense.[58] Of course, if a commission member includes such information in his report and the judge reviews it, as the arbiter of facts in the case, the judge may be influenced by the statements even though they were inappropriately included. While this is a concern, it may be confusing to a client if advised not to discuss certain items, such as the circumstances of the delinquent act, with the commission members, since in some cases, fact-recall and understanding of the circumstances of the offense may relate to competency. Attorneys must use their own judgment on a case-by-case basis in determining how to account for this situation.

D. Preparing for the Sanity Hearing

Preparing for a first sanity commission hearing entails a great deal of work. However, the preparatory work completed for the first hearing will be applicable to future hearings and will not have to be repeated for every client with competency-related issues. The first thing an attorney should do to prepare for a hearing is to carefully review, and even memorize, all of the Bennett criteria. Understanding and utilizing these criteria in examinations and presentation of evidence is key.

Counsel should also become educated regarding accepted competency evaluation tools and access an independent expert witness to consult. The attorney may not need to consult with an expert in every case, but when facing the issue for the first time, it is important to have a clear understanding of accepted professional practices. It is a good idea to get a copy of the resume, or curriculum vitae ("CV"), of every member of the sanity commission in order to review it thoroughly before the hearing. The attorney should study the CV and make sure that the member has the credentials required by Article 834 of the Children's Code. If a member does not have the required credentials, the attorney can object to their appointment and request that a new member be appointed to the sanity commission. The attorney should also study the CV to determine the level of experience and expertise the member has. This may be helpful on cross-examination. For instance, if most of the member's experience is based in working with and evaluating adults, you may want to spend a substantial

58 La. Child. Code Ann. art. 835(D).

amount of time questioning his knowledge of accepted testing mechanisms for adolescents, as well as his knowledge of adolescent development and adolescent-specific issues.

The examiners' assessment of capacity should include: 1) a review of the social history to learn about the youth's past and present life; 2) an inquiry into the youth's past experience with the police and the courts; 3) an inquiry into the youth's story surrounding the events; 4) an assessment of the youth's competencies; and 5) a mental status exam or psychological testing.[59] Questioning the examiner regarding the methods they used and whether the above steps were taken will reveal whether the report is reliable.

The following is a list of sample questions to pose to sanity commission members:

- Name, education, certifications?
- How long practicing? How long practicing in Louisiana?
- Work experience? Specific work experience working with children and adolescents? Compared with time spent working with adults?
- Experience doing competency evaluations? How many conducted? How many times testified? Percentage of these involving children? Percentage for delinquency proceedings? Percentage of cases in which you determined the defendant or respondent was not competent?
- When did you meet with the respondent? Where? Describe the facility/room? How much time did you spend with her?
- Did you review any documents before meeting with her? What documents?
- What testing methods did you use? What kinds of questions did you use?
- Did you review any documents after meeting with the respondent? What documents?
- Does the respondent have any mental health diagnoses or developmental disabilities that you are aware of? What are they? Do you believe the respondent needs additional testing?
- Do any of the diagnoses affect her ability to participate in the court process?
- Does the respondent function at a level normal for her age and development? Is she functioning at a level which enables her to understand and participate in the court process?

59 Thomas Grisso, Forensic Evaluation of Juveniles 101-05 (1998).

- Does the respondent understand the nature of the charge against her? Does she appear to appreciate its seriousness?
- Does the respondent appear capable of understanding the defenses available to her?
- Is the respondent capable of distinguishing a guilty plea from a not guilty plea? Does she understand the consequences of each?
- Is the respondent aware of her legal rights?
- Does the respondent understand the range of possible verdicts? Does she understand the consequences of a finding of delinquency?
- Was the respondent able to recall and relate facts pertaining to her actions and whereabouts at certain times?
- Is the respondent able to assist her counsel in locating and examining relevant witnesses?
- Is the respondent able to maintain a consistent defense?
- Would the respondent be able to listen to the testimony of witnesses and inform her lawyer of any distortions or misstatements?
- Does the respondent have the ability to make simple decisions in response to well-explained alternatives?
- Would the respondent be capable of testifying in her own defense?
- Is the respondent's mental condition likely to deteriorate under the stress of trial?

VI. CONCLUSION

An understanding of the elements and procedures regarding capacity, or competency, to proceed is crucial for a juvenile defender. Since a child cannot exercise her right to a fair trial when lacking the capacity to proceed, the decision regarding whether to raise competency issues before the court is a serious one which should be given significant consideration.

CHAPTER 11

PRE-ADJUDICATION PROCEDURES

This chapter provides an overview of pre-adjudication procedures a juvenile defender should follow in delinquency matters. As counsel for the juvenile, the defender's role is to ensure that these procedures are followed through zealous advocacy.

I. PETITION AND SUMMONS

A delinquency proceeding shall be commenced with the filing of a petition.[1] The petition is a document alleging that the child committed a delinquent act.[2] The petition in delinquency proceedings is the notice to the accused required by the Due Process Clause of the Constitution.[3] The notice must be sufficient to provide the juvenile an opportunity to prepare a defense.[4]

A. Form of the Petition

The district attorney may file a petition without leave of court; however, with leave of court, any person authorized by the court may file a petition if there are reasonable grounds to believe that the child is a delinquent child.[5] The petition must contain an appropriate caption; allegations of fact that are set forth in numbered paragraphs and in a simple, concise and direct manner; and must be verified or contain allegations of fact made on information and belief.[6] Failure to comply with these formal requirements is not grounds for dismissal unless it results in substantial prejudice.[7]

The petition shall also set forth with specificity:

> (1) The name, date, place of birth, sex, race, address and present location of the child.
>
> (2) The names and addresses of the parents and spouse, if any, of the child. If the parents are not within the state or cannot be located, the name and

1 La. Child. Code Ann. art. 842 (2006).
2 *See State v. Erven,* 02-36332 (La. App. 2d Cir. 10/23/02); 830 So.2d 368, 374; *State v. Robinson,* 33,720A (La. App. 2d Cir. 06/21/00); 764 So.2d 190, 194; *In re A.H.,* 95-1094 (La. App. 3d Cir. 01/31/96); 670 So.2d 361, 368.
3 *In re Gault,* 387 U.S. 1, 33 (1967) (Notice must be given sufficiently in advance so that a reasonable opportunity to prepare can be afforded and the notice must set forth the alleged misconduct with particularity to comply with due process requirements.).
4 *In re Hillman,* 353 So.2d 1356, 1358 (La. Ct. App. 3d Cir. 1977) (citing *In re Gault,* 387 U.S. 1 (1967)).
5 La. Child.Code Ann. art. 842 (2006); see *also Erven,* 830 So.2d at 374; *Robinson,* 764 So.2d at 194; *In re A.H.,* 670 So.2d at 368.
6 La. Child. Code Ann. art. 844 (2006).
7 *Id.*

address of the child's closest adult relative within the state; or, if there is none, the known adult relative residing nearest to the court.

(3) Facts that show the child is a delinquent child.

(4) The statute or ordinance which the child is alleged to have violated.[8]

The petition must further conclude with a request that the court adjudicate the child to be delinquent.[9]

Two or more delinquent acts may be charged in the same petition in a separate count for each act. Multiple charges may be joined if the acts are of the same or similar character or are based on the same act or transaction, or if two or more acts or transactions are connected together or constituting parts of a common scheme or plan.[10]

If the child is being detained, the delinquency petition shall be filed within 48 hours of the continued custody hearing.[11] If the petition is not timely filed, the child shall be released from custody.[12]

B. Amendments to the Petition

A petition can be amended to cure defects of form at any time with leave of court.[13] Prior to the adjudication hearing and with leave of court, the petitioner may amend the petition to include new allegations of fact or requests for adjudication.[14] If leave is granted for an amendment which includes new allegations, the child may request a continuance of the adjudication hearing.[15] A continuance may be granted for such period as is required in the interest of justice.[16] After jeopardy attaches to the case, a petition shall not be amended to include new allegations of fact or requests for adjudication.[17] Jeopardy begins when the first witness is sworn in at the adjudication hearing, or, in the case of an admission, when a valid disposition is made by judgment of the court.[18]

C. Service of the Petition

A copy of the petition and notice of right to counsel shall be served upon the child and upon every parent whose address is known or can be determined after due diligence.[19] The notice of right to counsel must provide as follows:

8 La. Child. Code Ann. art. 845(A) (2006).
9 La. Child. Code Ann. art. 845(D) (2006).
10 La. Child. Code Ann. art. 845(C) (2006).
11 La. Child. Code Ann. art. 843(A) (2006).
12 La. Child. Code Ann. art. 843(B) (2006); *see State v. Hamilton,* 96-0107 (La. 07/02/96); 676 So.2d 1081, 1084; *Erven,* 830 So.2d at 370.
13 La. Child. Code Ann. art. 846(A) (2006).
14 La. Child. Code Ann. art. 846(B) (2006).
15 *Id.*
16 *Id.*
17 La. Child. Code Ann. art. 846(C) (2006).
18 La. Child. Code Ann. art. 811 (2006).
19 La. Child. Code Ann. art. 847 (2006).

NOTICE

RIGHT TO COUNSEL

Under the laws of Louisiana, every child accused of delinquency is entitled to have a lawyer to be present and to assist the child to answer the attached petition. A child is entitled to be represented by a lawyer at every stage of proceedings in the juvenile court, including the right to appeal from any judgment of disposition which might be ordered by the court.

If the parents of an accused child are completely financially unable to afford to employ a lawyer, the court will appoint a lawyer and the state will pay for his services.

If the parents are found to be financially able to afford to employ a lawyer but fail to employ one, the juvenile court may appoint a lawyer for the child and require the parents to pay for the lawyer's services.

The financial ability or inability of the parents to employ a lawyer will be determined by the court after a hearing. The court may require the parents to pay for some or all of the costs of lawyer's services on behalf of the child.

After consulting with parents or other adult interested in the child's welfare, the child may be permitted by the court to proceed without the assistance of a lawyer. This decision can be made at any time during the proceedings in the juvenile court.[20]

D. Summons

When a delinquency petition involves a child whose parent is a resident of the State, the court shall issue a summons commanding that the child, his parents, and such other persons as the court deems proper, appear before the court at a designated time and place.[21] Service can be made upon residents personally, by domiciliary service, or by certified mail not less than 48 hours prior to the adjudication hearing.[22] Service upon a non-resident parent can be made by personal service or by certified mail to the address indicated in the petition, return receipt requested, at least five days prior to the adjudication hearing.[23] The court may decline to issue a summons for the parents of any child who is 18 years of age or older.[24]

If a person who is properly served with a summons fails to appear, the court may order that that person be taken into custody and brought before the court.[25] If a parent has been properly served and summoned and fails to appear or cannot be

20 La. Child. Code Ann. art. 848 (2006).
21 La. Child. Code Ann. art. 850(A) (2006).
22 La. Child. Code Ann. art. 849 (2006).
23 La. Child. Code Ann. art. 852(A) (2006).
24 La. Child. Code Ann. art. 850(B) (2006).
25 La. Child. Code Ann. art. 851 (2006).

found, the hearing may be held in the parent's absence.[26] A Court Appointed Special Advocate (CASA) may be appointed on behalf of the child under such circumstances.[27] If neither parent appears, the Court must appoint counsel for the child if the child is unrepresented.[28]

II. ANSWER

Once a petition has been filed and delinquency proceedings have commenced, a child must appear before the court to answer the allegations in the petition. If the petition is filed prior to or during the continued custody hearing, the court may order the child to answer the petition at the continued custody hearing.[29] If a child held in custody is not ordered to answer the petition at the continued custody hearing, she must appear to answer within *5 days* after the petition is filed.[30] A child not in custody must appear to answer the petition within *15 days* after the filing of the petition.[31] The court may extend the child's answer period for good cause.[32]

When a child appears to answer a petition, the court must determine whether the child is capable of understanding statements about her rights.[33] If the court determines that the child is capable, the court must advise the child of:

1) the nature of the proceedings;

2) the nature of the allegations in the petition against her;

3) her right to an adjudication hearing;

4) her right to be represented by an attorney and to have an attorney appointed to represent her;

5) her right in certain circumstances to waive counsel;

6) her right against self-incrimination; and

7) the court must apprise her of the consequences of any admission she may make.[34]

After being advised of her rights, the child may be called upon to answer the petition. The child may answer by denying the allegations, denying the allegations and plead-

26 La. Child. Code Ann. art. 853 (2006).
27 *Id.; see* La. Child. Code Ann. art. 424 (2006); *see generally* La. Child. Code Ann. art. 424.1–424.10 (2006).
28 La. Child. Code Ann. art. 853 (2006).
29 La. Child. Code Ann. art. 854(A) (2005); *see State v. Erven,* 02-36332 (La. App. 2d Cir. 10/23/02); 830 So.2d 368, 374; *State v. B.J.D.,* 35,409 (La. App. 2d Cir. 09/26/01); 799 So.2d 563, 565; *In re Franklin,* 95-0423 (La. App. 4th Cir. 07/26/95); 659 So.2d 537.
30 *Id.*
31 La. Child. Code Ann. art. 854(B) (2006).
32 La. Child. Code Ann. art. 854(C) (2006).
33 La. Child. Code Ann. art. 855(A) (2006).
34 La. Child. Code Ann. art. 855 (2006).

ing insanity, admitting to the allegations, or entering a response of *nolo contendere*[35] with permission of the court.[36] If the child denies the allegations, the court shall set the matter for an adjudication hearing. If the child admits the charges or enters a response of *nolo contendere*, the court must further inquire to determine whether there is a factual basis for an adjudication and, if so, may adjudicate the child a delinquent child.[37] If the child refuses to plead when called upon to answer to the allegations, or pleads evasively, a denial of the allegations in the petition is entered into the record.[38]

If the child enters an admission, the court must advise the child of her rights to adjudication, to confront her accusers and cross-examine witnesses, and the privilege against self-incrimination.[39] A valid guilty plea requires a showing that a defendant was informed of and waived her constitutional rights of trial and confrontation and the privilege against compulsory self-incrimination.[40] The process of advising a defendant of her rights prior to accepting a guilty plea is called being "Boykinized," after the seminal case on the issue, *Boykin v. Alabama*. The due process principles of *Boykin* apply to juvenile delinquency proceedings.[41] Counsel for the child must clearly explain to the client her right to an adjudication, to having the case proven beyond a reasonable doubt, to confront witnesses, to present evidence, and the right not to testify. The client should clearly understand these rights before waiving them to enter an admission. Advisement of the child's rights by the court must be made on the record. The court will not presume a valid waiver of rights from a silent record on appeal.[42]

35 "A plea of *nolo contendere* is simply a device by which a defendant may assert that he does not want to contest the issue of guilt or innocence. When a *nolo contendere* plea is accepted, it has essentially the same effect in that case as a guilty plea." *State v. Pitre,* 506 So. 2d 930 (La. Ct. App. 2d Cir. 1987) (citing *State v. Miller,* 495 So.2d 422 (La. Ct. App. 3d Cir. 1986); *State v. Brown,* 490 So.2d 601 (La. Ct. App. 2d Cir. 1986)).

36 La. Child. Code Ann. art. 856(A) (2006).

37 La. Child. Code Ann. art. 856(A)(3)–(4) (2006).

38 La. Child. Code Ann. art. 856(B) (2006).

39 *In re Q.U.O.,* 39, 303 (La. App. 2d Cir. 10/27/04); 886 So.2d 1188, 1190 (Neither the transcript nor the minutes of a hearing showed that appellant juvenile was formally advised of his rights; although he was actually represented by counsel at that and all other hearings, the appellate court could not infer compliance with the requirement that appellant be advised of his rights to an adjudication hearing and to confront his accusers, and his privilege against self-incrimination from a silent record; in the absence of such compliance, appellant's admission of guilt was vacated, and the adjudication of guilt and the disposition were reversed) (citing *In re Lucas,* 543 So.2d 634 (La. App. 1 Cir. 1989)).

40 *Boykin v. Alabama,* 395 U.S. 238 (1969); *State v. Montalban,* 00-2739 (La. 02/26/02); 810 So.2d 1106, *cert. denied,* 537 U.S. 887 (2002).

41 La. Child. Code Ann. art. 855 (2006); *In re J.G.,* 96-718 (La. App. 3d Cir. 12/11/96); 684 So.2d 563.

42 *Boykin,* 395 U.S. at 243; *State v. Deville,* 04-1401 (La. 07/02/04); 879 So.2d 689.

III. INSANITY DEFENSE

When a child pleads insanity, the court must appoint counsel and may appoint a sanity commission pursuant to Article 834 of the Children's Code to make an examination as to the child's mental condition at the time of the offense.[43] The court may also order the commission to make an examination as to the child's present mental capacity to proceed.[44] An assessment of insanity is different from competency because it determines the child's state of mind at the time of the offense, not whether the child is capable of understanding and participating in the delinquency proceedings at the time of the proceedings.

A determination of sanity is made at the adjudication. The members of the sanity commission may be called as witnesses by the court, prosecutor, or the child and may be cross-examined by any party regardless of who called the member as a witness.[45] Other evidence of insanity at the time of the alleged delinquent act may also be presented at adjudication by the child or the district attorney.[46] At the adjudication, it is the child who has the burden of proving that he is not delinquent by reason of insanity.[47]

If the court determines that the child was insane at the time of the offense, the court may:

> 1) Place the child in the custody of his parents or other suitable person,
>
> 2) Place the child on probation in the custody of his parents or other suitable person, or
>
> 3) Commit the child to the Department of Health and Hospitals, office of mental health or a private institution, or institution for the mentally ill pursuant to Article 895 of the Children's Code.[48]

43 La. Child. Code Ann. art. 869(A) (2006); *see generally* La. Child. Code Ann. art. 834 (2006) (setting forth the qualifications and procedures for the sanity commission).
44 *Id.*
45 La. Code Crim. Proc. Ann. art. 653 (2006).
46 *Id.*
47 La. Code Crim. Proc. Ann. art. 652 (2006).
48 La. Child. Code Ann. art. 894 (2006); *see generally* La. Child. Code Ann. art. 895 (provides that the court may only commit a child to a public or private institution if the court finds, based on psychological or psychiatric evaluation, that the child has a mental disorder, other than mental retardation, which has a substantial adverse effect on his ability to function and requires care and treatment in an institution).

IV. DIVERSION

A child entering the juvenile court system may be diverted from the formal juvenile delinquency process through an *informal adjustment agreement*. An informal adjustment agreement is an agreement between the child and the court that the child's case will be suspended for a specified period of time in exchange for the child's agreement to complete certain conditions under supervision, such as community service or participation in youth court or drug court programs.[49]

The court may authorize the district attorney or probation officer to effect an informal adjustment agreement if the child and district attorney have no objection.[50] The agreement does *not* result in a finding of delinquency. After an informal adjustment or diversion agreement has been reached, the court may, with concurrence of the district attorney, dismiss the petition or allow the petition to remain pending during the period covered by the agreement.[51] The court also has the authority to utilize a teen or youth court program and may assess a fee upon the child to offset program costs.[52]

The informal adjustment agreement shall set forth, in writing, the terms and conditions of the child's supervision.[53] The agreement must demonstrate that the child and her parents understand the child's right to an adjudication hearing and understand that they are not obligated to enter into the adjustment agreement. The agreement must further demonstrate that they consent to the terms of the agreement.[54] The agreement must be signed by the district attorney or the probation officer and by the child and his parents.[55]

An informal adjustment agreement can be entered into prior to the filing of a petition[56] or after the filing of a petition[57], but must be before the attachment of jeopardy.[58] If a petition in the case has already been filed, the adjustment agreement shall be filed in the record.[59] The period of informal adjustment may not exceed six months; however, the court may extend the agreement for one additional period not to exceed six months.[60]

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49 La. Child. Code Ann. art. 841(B) (2006); *see generally* sources cited *infra* note 63 (noting that incriminating statements made by the child during the agreement process cannot be used in a later adjudication hearing or criminal trial).
50 La. Child. Code Ann. art. 839(B) (2006); *see also In re A.M.,* 02-154 (La. App. 5th Cir. 05/15/02); 821 So.2d 116, 117; *In re K.D.,* 98-1175 (La. App. 1st Cir. 04/01/99); 730 So.2d 1077, 1078.
51 La. Child. Code Ann. art. 839(B) (2006).
52 La. Child. Code Ann. art. 839(C) (2006).
53 La. Child. Code Ann. art. 840(A) (2006).
54 La. Child. Code Ann. art. 840(B) (2006).
55 La. Child. Code Ann. art. 840(A) (2006).
56 La. Child. Code Ann. art. 839(A) (2006); *see generally In re A.M.,* 02-154 (La. App 5th Cir. 05/15/02); 821 So.2d 116, 117; *In re K.D.,* 98-1175 (La. App. 1st Cir. 04/01/99); 730 So.2d 1077, 1078.
57 La. Child. Code Ann. art. 839(B) (2006); *see also* La. Child. Code Ann. art. 840(D) (2006) (providing that informal adjustment agreement must be filed in the record if authorized after a petition is filed); *see generally In re A.M.,* 821 So.2d at 117; *In re K.D.,* 730 So.2d at 1078.
58 La. Child. Code Ann. art. 839(B) (2006); *see generally* La. Child. Code Ann. art. 811 (2006) ("When a child enters a denial to the petition, jeopardy begins when the first witness is sworn at the adjudication hearing. When he enters an admission to the petition, jeopardy begins when a valid disposition is made the judgment of the court."); *see, e.g., State v. R.W.,* 98-366 (La. App. 5th Cir. 10/14/98); 721 So.2d 943, 946.
59 La. Child. Code Ann. art. 840(D) (2006).
60 La. Child. Code Ann. art. 840(C) (2006).

If any of the terms of the agreement are violated, the case resumes from the point at which the agreement was perfected and the delinquency process is followed.[61] If the child satisfies the terms of the agreement, she must be discharged from further supervision, and the court shall dismiss the pending complaint or petition with prejudice.[62]

Evidence of an adjustment agreement or incriminating statements made by the child to any person giving counsel or advice incident to the agreement may not be used against the child at any adjudication or criminal trial if a proper objection is lodged.[63] However, evidence of the agreement or statements made by the child may be used at the disposition hearing or for the purpose of a predisposition investigation.[64]

A diversion program, or informal adjustment agreement, may be beneficial to a client who is in need of services and can cooperate with terms of an agreement, so that she can avoid a delinquency finding, probation, or secure confinement. However, when counseling a client on whether to enter into such an agreement, counsel should ensure that the child understands the negative consequences of entering into such an agreement. For instance, if a client did not commit a delinquent act and the state lacks evidence to prove delinquency, the child will be giving up her opportunity to have the alleged charges proven against her beyond a reasonable doubt. Entering into an informal adjustment agreement when a client has a strong case means unnecessary intrusion into her and her family's life. It is important to assess and consider the client's capacity to comply with the terms of the agreement. If the terms are such that the client will be unable to successfully complete the agreement, it may not be in the child's interest to enter into such an agreement. While entering into an adjustment agreement does not result in a delinquency finding, evidence of the agreement and statements by the child while participating in programming outlined by the agreement can be used against the child at disposition. Failure to successfully complete the conditions of an agreement could result in a harsher disposition against the client. The client should understand these negative consequences before entering into an informal adjustment agreement and the child should be counseled regarding the assessment of her best course of action in the case.

61 La. Child. Code Ann. art. 841(B) (2006); *see generally* sources cited *infra* note 63 and accompanying text.
62 *Id.*
63 La. Child. Code Ann. art. 841(C) (2006); *see also In re L.A.,* 95-409 (La. App. 5th Cir. 12/13/95); 666 So.2d 1142, 1146.
64 La. Child. Code Ann. art. 841(C) (2006).

CHAPTER 12

CASE PREPARATION

The previous chapters of this manual are geared toward helping to prepare an attorney to litigate a delinquency case. Understanding the juvenile court process, adolescent clients, the constitutional rights of children, and how to develop a relationship with a client and his family are all necessary parts of preparation. This chapter addresses the more practical aspects of preparation for adjudication, such as developing a theory of the case, investigation, discovery and witness development.

I. DEVELOPING A THEORY OF THE CASE

As early as possible in any representation, it is important to develop a theory of the case. Preliminary information is crucial in developing a meaningful theory, including thorough initial interviews with the client and review of the petition, police reports and other evidence. Once a theory has been developed, all further investigation, witness preparation, preadjudication motions, arguments in preliminary hearings and dealings with district attorneys and court personnel should be conducted in a strategic manner to promote the theory. Developing the theory early will allow an attorney to take control of the delinquency case by telling the client's story and presenting the client as a sympathetic child at every opportunity, thus guiding the court's perceptions of the client and the case.

A. Legal Research

The development of the theory of the case will require legal research regarding the elements of the criminal acts alleged, admissibility of evidence, and potential defenses. A review of the specific elements of the alleged delinquent acts in the Louisiana Revised Statutes is essential. Review each element carefully and conduct research on case law regarding each element. Very early in the case, there should be a clear understanding of all of the nuances of the elements of the crime the client is alleged to have committed. Once this research is complete, counsel should compare the elements with the facts of the case as learned from client interviews, investigation and discovery. If an early assessment of the facts as alleged by the prosecutor fail to satisfy the elements of the crime, counsel may be able to file a motion to dismiss the charges against the client. The research may also reveal that the State has alleged facts that could support a delinquency finding against the client. At this point, it will be necessary to evaluate the evidence the State might use to prove those facts at adjudication and to get creative with ways to challenge the incriminating evidence.

Careful review of the evidentiary rules as they apply to potential evidence is crucial. Understanding which evidence will likely be held admissible at adjudication and

which will not will assist in the development of the theory of the case and the strategy in challenging or contradicting incriminating evidence. It is important to also carefully assess the information that has been obtained which exculpates the client in light of evidentiary rules. If a theory of the case is developed around evidence that will not be admissible at adjudication, the theory will not be of much use.

Understanding the elements of the alleged delinquent act and the law regarding the admissibility of evidence in the client's case is important. An attorney should evaluate the law and facts to make an evaluation of the strength of the client's case. Based on the strength of the case and the facts, every possible defense should be discussed with the client.

In some situations, the facts and the law may weigh so heavily against the client that the attorney should consider discussing the possibility of an admission or plea with the client. No determinations regarding a plea should be made, however, until the elements, evidentiary rules and potential defenses are all carefully explored and an assessment has been made regarding the strength of the client's case.

B. The Theory of the Case

The legal research and facts about the incident should be used creatively to develop a theory of the case. Counsel must ensure that the theory is in line with the law, logical and supported by facts and evidence. The theory should be simple, believable[1] and discussed with colleagues to identify and address possible flaws. Once the theory of the case has been developed, it should be modified as more information is gathered in preparation for adjudication. However, the theory should guide the efforts at preparation for adjudication and should guide tactics and arguments in preliminary hearings, motions, and general appearances in court.

II. DISCOVERY

As soon as possible, counsel should secure information and records about the client and his education and mental health history. Ideally, this information would be obtained prior to the continued custody hearing if the client were detained. As discussed in earlier chapters, release forms for school records and mental health records should have been obtained from the client and his parents at the initial attorney-client meeting. Background information about the client is essential to prepare for preliminary hearings and disposition. Additional information is necessary to prepare for adjudication, including evidence gathered by the State, which can be obtained through discovery requests, and evidence in the possession of third parties, which can be obtained through subpoenas.

1 Steven Lubet, Modern Trial Advocacy: Analysis and Practice 8–9 (2d ed. 1997).

A. Discovery Requests

A Motion for Discovery should ensure that all potential evidence from the State is received.[2] This discovery request must be filed with the court within 15 days of the date the client appeared to answer the delinquency allegations against him.[3] The court may grant leave for the filing of the motion at a later time[4], or may permit requests by oral motion in the interests of justice.[5] While some prosecutors in Louisiana have an open discovery policy and will allow defense counsel to review their entire file or make copies of the entire file as a matter of course, a written motion for discovery is crucial as is a request for a written response to the motion. This will require the prosecutor to affirm in writing that all evidence has been submitted. If evidence is then later presented at a hearing or adjudication which was not identified in the prosecutor's response, there will be a clear challenge to the presentation of the evidence.

1. The Right to Discovery

The right to discovery has been established by the Supreme Court of the United States as an essential component of the Due Process Clause of the Fourteenth Amendment.[6] The Due Process Clause entitles a criminal defendant, or juvenile facing delinquency allegations, to the prompt production of all exculpatory evidence, as well as inculpatory evidence, which is material to either adjudication or disposition. In its seminal case on the right to discovery, *Brady v. Maryland,* the Supreme Court stated: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."[7] In *State v. Jackson*, the Louisiana Supreme Court specifically held that the *Brady* doctrine obligates the prosecution to disclose evidence supporting mitigating factors.[8]

a. The Right to Exculpatory Evidence

The right to exculpatory evidence encompasses not only favorable evidence regarding the alleged criminal act, but also evidence that may be used to impeach witnesses—such as evidence of some kind of bias or interest.[9] So-called "deals" or plea bargains with witnesses or co-defendants are a classic form of *Brady* material and must be disclosed by the prosecution.[10] The purpose of disclosing the terms of a plea bargain is to furnish defense counsel with information that will allow him to attack the credibility of the witness.[11] The courts should not tolerate prosecutorial par-

2 *See generally* La. Child. Code Ann. art. 866 (2006).
3 La. Child. Code Ann. art. 865(A) (2006).
4 La. Child. Code Ann. art. 865 (2006).
5 La. Code Crim. Proc. Ann. art. 729 (2006).
6 *Brady v. Maryland,* 373 U.S. 83 (1963).
7 *Id.* at 87.
8 *State v. Jackson,* 608 So.2d 949, 958 (La. 1992).
9 *State v. Bailey,* 367 So.2d 368 (La. 1979); *State v. Curtis,* 384 So.2d 396 (La. 1980).
10 *See Giglio v. United States,* 405 U.S. 150, 153 (1972).
11 *United States v. Sanfilippo,* 564 F.2d 176, 178 (5th Cir. 1977).

ticipation in technically correct, yet seriously misleading, testimony that serves to conceal the existence of a deal with material witnesses.[12]

In *State v. Lindsey*, the defendant's armed robbery conviction was reversed after the State suppressed evidence that its witness, a co-defendant, expected to receive some undetermined benefits from testifying:

> In the instant case, the prosecutor failed to disclose to Lindsey that he promised [state witness and co-defendant] Pate favorable consideration if she testified and if her testimony were deemed credible. This promise gave Pate a direct, personal stake in Lindsey's conviction. The fact that a specific reward was not guaranteed through a promise or a consummated plea agreement, but was expressly contingent on the state's good faith and satisfaction with Pate's testimony, served only to strengthen any incentive to testify falsely in order to secure Lindsey's conviction.[13]

b. The State Must Disclose More than the Prosecutor's File

The Louisiana Supreme Court has previously made clear that the State must divulge more than material the prosecutor may choose to slip into his or her file. In *State v. Lee,* the Court held:

> [T]he code does not limit or deny discovery on the basis of whether an article is contained in the district attorney's file. Therefore, if the district attorney has the power to permit or authorize the discovery of an article within the possession, custody, or control of the state, that falls within the criteria of discoverability and does not fall within the statutory limitations on discovery, the court should order discovery.[14]

The prosecution is therefore under an affirmative obligation to assure that all branches of government disclose evidence favorable to the defense. In *Giglio v. United States,* the United States Supreme Court likewise held that the prosecution cannot bury its head in the sand to justify a failure to disclose discoverable evidence:

> [W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity, and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government.[15]

In short, the duty to disclose is not limited to prosecutors, but embraces *all* members of the "prosecution team," which includes all law enforcement officers, probation officers and agencies that have worked on the case and thereby contributed to the prosecutorial effort.[16]

12 *Blankenship v. Estelle,* 545 F.2d 510, 513 (5th Cir. 1977).
13 *State v. Lindsey,* 621 So.2d 618, 626 (La. Ct. App. 2d Cir. 1993).
14 *State v. Lee,* 531 So.2d 254 (La. 1988).
15 *Giglio,* 405 U.S. at 154.
16 *See Schneider v. Estelle,* 552 F.2d 593, 595 (5th Cir. 1977) ("The petitioner...allege[s] that Nicholson was a state law

c. Discovery Must Be Timely Disclosed

Since trial strategy is dictated in large part by discovery of the State's case, disclosure must be timely,[17] whether the material is unfavorable[18] or helpful.[19] In *State v. Foret*, the Louisiana Supreme Court condemned the 11th-hour disclosure of a prosecution expert's report, noting "the inherent prejudice of the last minute disclosure in precluding adequate time to prepare to rebut the expert's testimony either by effective cross-examination or by offering the testimony of a defense expert."[20] Timely disclosure is particularly important in juvenile delinquency proceedings because of the shortened time frames for adjudication.

d. Good Faith Is No Excuse

While bad faith may go to the remedy that will be applied in cases of failure by the prosecution to turn over discoverable evidence, good faith is not a defense to a discovery violation:

> In *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the United States Supreme Court held suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, regardless of the good faith or bad faith of the prosecution. Although there is no duty to provide defense counsel with unlimited discovery, if the subject matter of such a request is material or if a substantial basis for claiming materiality exists, it is reasonable to require the prosecution to respond by either furnishing the information or submitting the problem to the trial judge.[21]

2. Louisiana Discovery Guidelines

The Louisiana Children's Code does not set forth specific discovery requirements for delinquency cases, but states that the discovery provisions of the Louisiana Code of Criminal Procedure are applicable in delinquency cases.[22] The Code of Criminal Procedure provides that a defendant is entitled to the following discovery *upon motion of the defendant:*

> **(1) Statements by the defendant,** including any written or recorded confession or statement of any nature, the contents of any oral confession

enforcement officer. As such, he was a member of the prosecution team."); *see also United States v. Buchanon,* 891 F.2d 1436, 1442-43 (10th Cir. 1989); *United States v. Endicott,* 869 F.2d 452, 455 (9th Cir. 1989); *United States ex rel. Smith v. Fairman,* 769 F.2d 386, 391 (7th Cir. 1985).

17 *State v. Mitchell,* 412 So.2d 1042, 1044 (La. 1982).

18 *State v. Meshell,* 392 So.2d 433, 435 (La. 1981) (noting that if defense counsel had been provided with timely disclosure of defendant's rap sheet, "he would have undertaken a different defense strategy").

19 *State v. Prudholm,* 446 So.2d 729, 738 (La. 1984) (holding that disclosure should be made in time "to allow the defense to use the favorable material effectively in the presentation of its case").

20 *State v. Foret,* 628 So.2d 1116, 1120 (La. 1993).

21 *State v. Martin,* 376 So.2d 300, 306 (La. 1979) (citing *U.S. v. Agurs,* 427 U.S. 97 (1976)), *cert. denied,* 449 U.S. 998 (1980); *see also State v. Nata,* 452 So.2d 785, 786 (La. App. 4th Cir. 1984) ("The state's good faith, however, would not justify denying an appropriate remedy under C.Cr.P. 729.5A, in any case in which the state's noncompliance (even in good faith) resulted in basic unfairness to the defendant.") (citing *State v. Davis,* 399 So.2d 1168 (La. 1981)).

22 La. Child. Code Ann. art. 866 (2006); La. Code Crim. Proc. Ann. art. 716–729 (2006).

or statement which the district attorney intends to offer at trial, or the contents of any oral statement made to law enforcement officers before or after arrest which the district attorney intends to present at trial;[23]

(2) A copy of defendant's criminal record, including arrests or convictions;[24]

(3) Documents and tangible objects, including books, papers, buildings, places, etc., which are within the possession, custody or control of the state and which are favorable to the defendant and material to the issues of guilt or punishment, are intended for use by the state as evidence, or were obtained from or belong to the defendant. The defendant is allowed to inspect, copy, test scientifically or photograph these items;[25]

(4) Reports of examinations and tests, including physical or mental examinations or scientific tests or experiments made in connection with or material to the particular case. Any exculpatory evidence of this nature must be produced even if not intended for use at trial. Biological samples gathered for testing such as hair, urine and blood, must be made available to defendant for independent testing at his expense;[26]

(5) Evidence of other crimes admissible under Louisiana Code of Evidence Article 404 but not including evidence of offenses which relate to conduct that constitutes an integral part of the act that is the subject of the proceeding or of crimes for which the defendant was convicted;[27]

(6) Statements of coconspirators;[28] and

(7) Confessions and inculpatory statements of co-defendants that the district attorney intends to use at trial and any exculpatory statements by co-defendants even if not intended for use at trial by the district attorney.[29]

A defendant does not have the right to obtain state reports, memoranda or other internal state documents made by the district attorney or other agents of the state involved in the investigation or prosecution, nor does he have a right to statements made by other witnesses to the district attorney or other agents of the State, unless such documents or statements also fall into one of the seven categories listed above.[30]

Once a motion for discovery is filed, the court may not deny the motion without a contradictory hearing unless it is clear that the moving party is not entitled to the dis-

23 La. Code Crim. Proc. Ann. art. 716 (2006).
24 La. Code Crim. Proc. Ann. art. 717 (2006).
25 La. Code Crim. Proc. Ann. art. 718 (2006).
26 La. Code Crim. Proc. Ann. art. 719 (2006).
27 La. Code Crim. Proc. Ann. art. 720 (2006).
28 La. Code Crim. Proc. Ann. art. 721 (2006).
29 La. Code Crim. Proc. Ann. art. 722 (2006).
30 La. Code Crim. Proc. Ann. art. 723 (2006).

covery.[31] A juvenile facing delinquency charges is a party entitled to discovery. The court's order granting a discovery request shall specify the time, place and manner of making the discovery available.[32] Therefore, the motion should set forth a date when discovery should be tendered and the specifics regarding the form of discovery to be tendered, for instance, whether it should be copies of documents or access to documents and evidence for examination and review. Counsel should be mindful of the short timeframes of the delinquency process and request expedited responses to discovery. Specify in the request what types of evidence should be turned over, and provide an exhaustive list. For instance, specify copies of statements, photographs or video evidence, and ask for access to inspect physical evidence such as a weapon or stolen goods on a specified date, and that certain evidence be made available to an expert for analysis.

All parties in a delinquency or criminal case have a continuing duty to disclose new evidence discovered or additional evidence intended for use at trial or adjudication by notifying the court and the other party of the evidence.[33] Therefore, if the prosecutor in a case discovers new evidence or decides to use evidence not disclosed previously at adjudication, he must advise the child's counsel of the existence of the evidence, so that an additional motion for the disclosure of that evidence can be made.[34] However, to avoid having to file additional motions upon disclosure of this additional evidence, consider requesting an order from the court in the original motion for discovery which requires the prosecutor to automatically turn over any additional evidence as he discovers it.

3. Sanctions

If any party fails to comply with the court's discovery order, the court may sanction the party by barring him from presenting the evidence at trial, granting a mistrial, ordering a continuance, or by entering an appropriate order other than dismissal.[35] If a party willfully fails to comply with the court's discovery order, the court may hold the party in contempt of court.[36] Therefore, the proper response if a prosecutor fails to comply with a court's order for discovery is a Motion to Compel requesting that sanctions be ordered against the state, preferably that the state be barred from presenting the undisclosed evidence at adjudication.

4. Responding to Discovery Requests

The district attorney may request certain discovery items from a child's attorney. In fact, once a Motion for Discovery is filed, it is likely that the prosecutor will respond by filing one himself even if that is not generally his practice.

31 La. Code Crim. Proc. Ann. art. 729.1(A) (2006).
32 La. Code Crim. Proc. Ann. art. 729.2 (2006).
33 La. Code Crim. Proc. Ann. art. 729.3 (2006).
34 *Id.*
35 La. Code Crim. Proc. Ann. art. 729.5(A) (2006).
36 La. Code Crim. Proc. Ann. art. 729.5(B) (2006).

Make sure that the materials requested are not covered by attorney-client privilege, the work product doctrine or the Fifth Amendment right against self-incrimination before responding. Make sure to respond to any requests timely and thoroughly, so as to avoid any appearances of bad faith.

B. Subpoenas and Subpoenas *Duces Tecum*

The investigation of a client's case through discovery requests and investigations will undoubtedly uncover agencies and persons that will need to be subpoenaed for appearance at hearings or adjudication and to provide additional records. Issue the subpoenas as early as possible to be prepared for adjudication within the timelines provided for by the Children's Code. Last-minute record requests are bound to backfire and result in the absence of important evidence at trial.

1. Subpoenas

The court shall issue subpoenas for the compulsory attendance of witnesses at hearings or trials when requested by the State or the defendant.[37] The clerk of court may also issue subpoenas for attendance of witnesses.[38] A defendant may subpoena, at the expense of the parish, six witnesses for misdemeanor cases and 16 witnesses in felony cases.[39] Additional witnesses may be subpoenaed at the expense of the defendant.[40] However, if a defendant is indigent and additional witnesses are required, a request can be made before the court for the allowance of additional witnesses at the expense of the parish.[41] The application to the court must allege that the testimony of the additional witnesses is "material and not cumulative and that the defendant cannot safely go to trial without it."[42]

When issued, the subpoena must state the name of the court, the title of the case, and shall command attendance at a specific time and place.[43] The sheriff of any parish in which the witness may be found or where the proceeding is pending may serve the subpoena and make a return of service.[44] Any witness properly served who fails to appear as ordered may be held in contempt of court.[45]

2. Subpoenas Duces Tecum

A subpoena *duces tecum* may also be issued ordering a person to produce books, papers, or other tangible things in his possession or under his control if the item is described with reasonable accuracy.[46] If a subpoena *duces tecum* is deemed unrea-

37 La. Code Crim. Proc. Ann. art. 731(A) (2006).
38 *Id.*
39 La. Code Crim. Proc. Ann. art. 738 (2006).
40 *Id.*
41 La. Code Crim. Proc. Ann. art. 739 (2006).
42 *Id.*
43 La. Code Crim. Proc. Ann. art. 733 (2006).
44 La. Code Crim. Proc. Ann. art. 734(A) (2006).
45 La. Code Crim. Proc. Ann. art. 737 (2006).
46 La. Code Crim. Proc. art. 732 (West 2006).

sonable or oppressive, the court can vacate or modify the subpoena.[47] Keep in mind that some agencies may need more than a subpoena to release records. For instance, hospitals and mental health agencies may need, in addition to a subpoena *duces tecum* from the court, a release of information form from the client or his parents in order to comply with federal medical disclosure requirements as set forth in HIPPA. It is wise to first ask the agency from which records are sought about their policy regarding subpoenas for documents and the type of release of information required. A sample authorization for release of information form can be found in the appendix of this manual and should comply with federal disclosure rules. However, it is still wise to check with each agency regarding their specific policies, so as to avoid unnecessary delays in obtaining documents.

III. INVESTIGATION[48]

Investigation is a key component of preparing for adjudication. A thorough investigation can mean the dismissal of delinquency allegations against a client through the discovery of evidence which exculpates a client and demonstrates weaknesses in the State's case. It is also the professional duty of the defense counsel to investigate his client's case.

> The duty to investigate exists regardless of the client's admissions or statements of facts establishing responsibility for the alleged facts and conditions or of any stated desire by the client to admit responsibility for those acts and conditions.[49]

It is best to utilize an investigator, if possible. If the office does not have investigators on staff, file a motion for money to hire one. Experienced investigators are in a position to gather information that an attorney never could. In addition, having funds to hire investigators familiar with the client's neighborhood in a particular case can be beneficial. Also family members are wonderful sources of information for specific issues, because they are more familiar with the neighborhood, witnesses and victims of the case.

The benefit to having another person conduct the investigation in a client's case is that the investigator can testify regarding her findings or any inconsistencies in witness statements. Although it will be helpful to be involved in the investigation, a child's attorney will not be able to both testify regarding the findings at the adjudication or at other hearings and remain counsel for the client. The attorney might not

47 *Id.*

48 This section of the Manual was written with assistance from A Fighting Chance, a nonprofit capital defense investigation office. A Fighting Chance is located in New Orleans, La., and is a valuable resource for questions and advice regarding investigations. A Fighting Chance can be contacted at 636 Baronne Street, New Orleans, Louisiana 70113; by phone at (504) 558-9867; or online at www.a-fighting-chance.org.

49 *Standards Relating to Counsel for Private Parties* •• 4.3(a) & 7.3(a)(i), *in* Institute of Judicial Administration & American Bar Association, Juvenile Justice Standards (1996).

have the time a thorough investigation requires, which can include exploring the neighborhood and crime scene, tracking down witnesses, searching criminal and civil court files, issuing information requests to various state agencies, and conducting media searches. If the attorney does conduct some of the investigation, he should make sure to bring a third person who can later be called as a witness if necessary.

Work with the investigators that will be assisting to develop an investigation plan. Prioritize issues to be investigated and make sure to include issues relevant both to the adjudication and disposition. The investigation should commence immediately upon involvement in the case, as witnesses may begin to disappear or memories may fade, and evidence may be more likely to disappear or be tampered with. The following is a list of potential sources of information to be targeted by the investigation.

A. Sources of Information for the Investigation

- Police and Offense Reports: Provide facts and details of the crime such as the date, time, location and a short narrative of what the police found upon arrival, as well as names of investigating officers, witnesses and victims who should be questioned. This also provides the address of the crime scene.
- Media: In high-profile cases, the person investigating should collect all newspaper articles and review all television news coverage of the case to get names of potential victims, witnesses, facts, etc. This information may also be a basis for a change of venue motion.
- Crime Scene: The person investigating should go to the crime scene after talking with client to take pictures, measure distances and make diagrams, if necessary. Things may happen to the crime scene over time as the seasons change, surrounding buildings are removed or renovated, or storms blow down trees or other land markers. Preserving the scene as it looked at the time of the crime is important. The person investigating should take pictures and visit the scene at the same time of day as the alleged delinquent act. If photos or measurements are taken, a person other than counsel should be present to lay the foundation for the photos and the scene if necessary at adjudication.
- Neighbors: Anyone who lived near the crime scene can provide information and identify witnesses. Be aware and sensitive that some relatives of the victim may be neighbors to the crime scene.
- Prosecution Evidence: Counsel should obtain color reproductions of all pictures, get copies of all videotapes, document everything that was seized at the scene and make an appointment to examine items in the State's custody.
- The Client: Counsel must review the circumstances of the offense with the client, determine key participants to the defense and understand the relationships between all participants, witnesses, victims, and co-

defendants. Find out the client's relationship with these people and how long he has know them.

- Client's Family and Friends: The person investigating should talk to the client's family and friends to find out whether the client talked to them about the crime.
- Witnesses: The person investigating should interview all potential State and defense witnesses but avoid doing group interviews or phone interviews and calling witnesses ahead of time. Surprising a witness often pressures them into answering questions. Calling ahead provides them with time to think about what they will say, or even to consult with the district attorney on the case.

The person investigating should type notes and memos within 48 hours of the interview or fact-finding to preserve the information. The memos should be as detailed as possible to avoid having to revisit scenes or repeat witness interviews or evidence review.

B. Records Collection and Public Records Requests

In some cases, counsel should obtain public records regarding a client, the officers involved, witnesses or related agencies. Most records can be obtained through subpoena, a request to the appropriate agency or clerk's offices, or a public records request. When determining whether to use subpoena, counsel should consider whether it is good for the district attorney and the court to be given advance warning that the child's attorney is searching for the documents. Counsel may want to strategically avoid the use of a subpoena when records can be obtained through alternate means. Following is a description of some records collection options:

1. Courthouse Searches

Certain information that may assist in a case is publicly available at courthouses. For instance, adult criminal court files and federal court files are open to the public. In addition, certain civil court files such as divorce cases, successions, child support cases, car accident cases, and civil suits against police officers, lawyers and other professionals are publicly accessible from the civil court house. These court records can generally be obtained by visiting the clerk's office of the relevant court and requesting the files. Ask clerks for assistance in searching their databases for cases involving certain individuals such as witnesses, arresting officers and victims.

2. State Public Records Requests

The Louisiana Constitution provides, "[n]o person shall be denied the right to... examine public documents, except in cases established by law."[50] The Louisiana Revised Statutes presume that the public will have access to certain records:

50 La. Const. art. 12 § 3.

"[e]xcept as otherwise provided...any person of the age of majority may inspect, copy or reproduce or obtain a reproduction of any public record."[51] Public agencies can charge a reasonable fee for the production of copies of the records, but can also provide copies to indigent clients at a reduced charge or no charge.[52] State agencies may charge fees according to the uniform fee schedule adopted by the commissioner of administration.[53] No fee may be charged for merely reviewing records without obtaining copies of them.[54]

These public records laws are not tied to discovery, but are a right given to all citizens. Neither the police nor the prosecutor can deny access to public records by the child's counsel. There are four ways to gain access to records: 1) an inspection; 2) a copy; 3) a reproduction made by the requestor; or 4) obtain a reproduction from the custodian.[55] The form of production is the citizen's choice, not the custodian's.[56]

If the custodian of records determines that the records requested are not subject to a public records request, he must reply to any request for access to public documents within three days in writing and "shall contain a reference to the basis under law which the custodian has determined exempts a record, or any part thereof, from inspection, copying, or reproduction."[57] If the records custodian denies the request to produce, defense counsel can bring a suit to gain access.[58]

3. Federal Freedom of Information Act Requests

The Federal Freedom of Information Act ("FOIA")[59] also provides for the right of access to information held by governmental agencies. An agency to which FOIA applies is any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."[60] A request for information pursuant to FOIA should be made in writing and should cite relevant federal law.

4. Office of Community Services Records Requests

If a client's family received services or intervention from the Department of Social Services Office of Community Services ("OCS"), records may exist documenting the client's home life or instances of parental neglect and abuse, as well as institutional and mental health records pertaining to various family members. The OCS office that monitored the client's family should be approached for relevant records. Although fairly strict confidentiality laws exist pertaining to these records, offices have differ-

51 La. Rev. Stat. Ann. § 44:31(B)(1) (2006).
52 La. Rev. Stat. Ann. § 44:32(C)(1)(a) (2006).
53 La. Rev. Stat. Ann. § 44:32(C)(2) (2006).
54 La. Rev. Stat. Ann. § 44:32(C)(3) (2006).
55 *Title Research Corp. v. Rausch,* 450 So.2d 933, 937 (La. 1984).
56 *Id.*
57 La. Rev. Stat. Ann. § 44:32(D) (2006).
58 La. Rev. Stat. Ann. § 44:35(A) (2006).
59 *See generally* Freedom of Information Act of 1966, 5 U.S.C. § 552 (2006).
60 5 U.S.C. § 552(f)(1) (2006).

ent policies for releasing them. Authorization from surviving parents as well as the client will assist in obtaining these records. In many places, however, a court order is required. The case worker(s) assigned to the client's family may be a potential witness or source for obtaining records.

5. Office of Youth Development Records Requests

The Office of Youth Development ("OYD") is another invaluable source of information if a client has had previous juvenile court involvement or been held in a juvenile secure care facility or group home. OYD records regarding a client's probation records or custody can be obtained by presenting an authorization of release of information signed by the client if age 17 or older, signed by the child and the parent if the child is under the age of 17, or by presenting a court order granting access to such records. The release or court order should specifically mention educational, psychological, HIV or AIDS, medical or any other categories of information. Records requests should be written and include either the client's release or a court order to OYD.

The client's file can be reviewed by or copied for counsel. Some youth files are extensive, including hundreds or thousands of pages of documents that may not be needed. A request for a copy of the entire file may result in a delay due to the volume of materials. To prevent unnecessary expenditures or delay, counsel should only request documents that will assist in the child's defense. A reasonable request should be complied with promptly. Contact OYD's attorneys for assistance, if there is trouble obtaining documents from any OYD facility or agency.

IV. WITNESS DEVELOPMENT

An investigation plan should include slots for scheduling interviews with potential witnesses identified by the client, the state and other witnesses. Witnesses should be interviewed as soon as possible to ensure the incident is fresh in their memory. The interviewer should produce a record of the interview to impeach the witness if their account changes at adjudication. The interviewer should summarize the witness's account in a witness statement that reflects the witness's voice and frequently employs direct quotes from the witness. The witness statement should be reviewed and signed by the witness. If a notary is available, the interviewer should secure an affidavit from the witnesses.

A. Lay Witnesses

Lay witnesses include alibi witnesses, eyewitnesses or character witnesses. All witnesses that will be subpoenaed and called at the adjudication should be carefully questioned and prepared. A mock cross-examination is an excellent way to prepare a witness, although a witness should use their own words and voice so that they do not appear coached. If juvenile witnesses are called, they must be strong enough to

withstand both testifying in court and possible questioning by the judge and district attorney.

B. Hostile Witnesses

Some State witnesses and the victims of the alleged crime may be hostile to defense counsel and investigators. Counsel should be continuously attempting to obtain as much information from them as possible yet not to offend them by directly questioning the veracity of their story. Ideally, witnesses should be interviewed more than once to try to build trust and to follow-up on certain issues.

An independent investigator may be particularly helpful for hostile witnesses, since an investigator doesn't actually represent the youth in court, and so may appear less biased to the witnesses than the child's attorney. It is particularly important to get statements by hostile witnesses in writing. Although an investigator can be called to testify to rebut any altered statements or testimony by the witnesses, a written statement is preferable and more compelling for impeachment purposes.

Other witnesses, such as police officers or probation personnel, may refuse to talk with the child's counsel by stating it is against policy. Counsel should subpoena these people for preliminary hearings to create an opportunity to ask them questions outside of the adjudication hearing. Although witnesses can refuse to talk with the defense attorney on their own accord, the State cannot deny access to its witnesses or instruct its witnesses not to speak with the child's attorney.

C. Expert Witnesses

In many cases, expert witnesses are helpful for preliminary hearings, adjudication or disposition. Despite any budgetary concerns of the jurisdiction, counsel should file a Motion for Funds for an Expert Witness if their client is indigent and they need the assistance of an expert. A juvenile charged with a delinquent act is entitled to present a defense and, if indigent, the state must provide the means necessary to enable such a defense. As the United States Supreme Court stated in *Ake v. Oklahoma,*

> We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.[61]

The Supreme Court held in *Ake* that the State is required to supply the indigent criminal defendant with the "basic tools of an adequate defense," including paying for expert witness fees.[62]

An expert witness is a professional with special education, training and experience who can aid the finder of fact in reaching a decision. Possible expert witnesses may

61 *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).
62 *Id.* at 77 (citing *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)).

include psychologists, psychiatrists, forensic specialists, probation officers, school officials, special education experts, criminologists and penologists. Whether a witness will be considered an expert depends on the witnesses' qualifications and the purpose of their proposed testimony. For instance, a psychologist's testimony regarding a professional assessment of the dangerousness of the client is considered an expert opinion. If a psychologist who oversees a group home or detention center discusses the client's activities and behavior at the group home, the witness does not have to be certified as an expert.

Although experts can assist in the representation of a client, counsel should still educate himself on the area of expertise, as well as the requisite education and experience needed to become an expert in the particular field of knowledge. If possible, counsel should seek the assistance of both consulting and testifying experts.[63] To obtain funds for a consulting expert, counsel should file an *Ex Parte* Motion for Funds to Hire a Consulting Expert. Consulting experts can guide the theory of the case by providing advice in a specialized area, offering a second opinion and assisting in the preparation of the cross-examination of expert witnesses called by the State.

D. Your Client as a Witness

An attorney should cautiously consider whether to put her client on the stand. Since the client ultimately decides whether he will testify, he should be counseled on whether his testimony would benefit the case. Testifying opens the client to cross-examination and impeachment by the district attorney and potential questions by the judge. The client must be thoroughly prepared to respond to the pressures of testifying in his own case and must be able to provide honest answers to questions without incriminating himself.

Before the client testifies on his own behalf, counsel should explain the oath and carefully go over testimony. The client should be advised to listen carefully to each question, to think carefully, and not rush answers, even if pressured by the prosecutor. The client should be instructed to pause after each question to allow for an objection to questions and to not speak after an objection until the judge tells him to answer. The client must know that the Fifth Amendment gives him the right not to testify as to anything that would incriminate him. Finally, the client should be aware of the importance of honesty, as well as the consequences of perjury.

Counsel should practice cross-examination with the client by cross-examining the client in the manner of a prosecutor at adjudication. At all times, counsel should be cautious not to over-rehearse the client, because his answers may sound memorized and coached. The client should use his own voice and words so that his responses are credible, while speaking clearly and not using profanity in the courtroom.

63 Thomas F. Geraghty & Will Rhee, *Learning From Tragedy: Representing Children in Discretionary Transfer Hearings*, 33 Wake Forest L. Rev. 595, 635 (Fall 1998).

V. CLIENT INTERVIEWS

Meeting regularly with the client builds rapport, maintains the trust of the client, and is crucial for adjudication preparation. Chapter 7 of this manual discusses the importance of client relationships, interview techniques and a thorough initial interview. Sample interview questions are in the appendix. The client can be the best source of information on the alleged incident and for identifying witnesses and information that should be subpoenaed. As the case is investigated and witnesses are interviewed, information should be shared with the client to fully understand the implications of that evidence. In addition, counsel should continue to consult with the client as the case progresses and procedural issues arise.

VI. CONCLUSION

Careful preparation and zealous advocacy in a delinquency case can mean the dismissal of charges against a client and the avoidance of his involvement in a juvenile justice system that can often be disruptive in the life of a child. Diligent case preparation preserves and enhances the goals of an adversary system and fundamental fairness.

CHAPTER 13

PRE-ADJUDICATION MOTIONS AND HEARINGS

Motions practice is an essential component of advocacy in delinquency cases. Creative preadjudication motions can result in positive outcomes for a client, including the suppression of crucial prosecutorial evidence, the opportunity to examine prosecution witnesses on the stand prior to adjudication, the opportunity to determine the strength of the prosecutor's case, and even outright dismissal.

This chapter provides an overview of pre-adjudication motions including motions for change of venue, discovery, expert witness funds, suppression of evidence and dismissal.[1]

I. PRE-ADJUDICATION MOTIONS GENERALLY

The Louisiana Children's Code requires that all pre-adjudication motions or other requests for relief be filed within 15 days of the child's appearance to answer the petition.[2] However, motions may be filed beyond the 15 days when in the *interest of justice*.[3] All preadjudication motions must set forth, with particularity, the grounds upon which relief is sought.[4]

Once filed, the court may grant a pre-adjudication motion without a contradictory hearing; assuming the facts alleged in the motion are true,[5] the moving party is not entitled to relief.[6]

Many types of pre-adjudication motions may be relevant to the case. In order to provide time for preparing written motions, it is crucial that other preparatory measures discussed in earlier chapters—such as interviews with a client and his family, records requests, investigation, legal research and the development of a theory of the case—be conducted immediately. Despite the opportunity to gain leave from the court to file pre-adjudicatory motions after the 15-day window, it is safer for counsel to file all pre-adjudicatory motions within the 15-day timeframe, rather than rely on the discretion of the judge.

Although many motions may be presented orally, motions should be in writing with a request for a written response from the State. Written motions create a record for

1 Motion worksheets and other resources can be obtained from the websites of the Southern Juvenile Defender Center (www.juveniledefender.org) or the Juvenile Justice Project of Louisiana (www.jjpl.org).
2 La. Child. Code Ann. art. 865(A) (2006).
3 *Id.*
4 La. Child. Code Ann. art. 865(B) (2006).
5 La. Child. Code Ann. art. 865(C) (2006).
6 *Id.*

appealable issues and advance a theory of the case and the client. Motions should present the facts and circumstances of the case in a light favorable to the client to pressure the judge to rule in favor of the client.

Motions should:

- Be clear and concise;
- Include a conclusion specifically stating the relief sought;
- Include the attorney's signature and a certification of service, along with a list of all parties served at the end of the motion;
- Include a proper caption on the front page;
- Propose orders, including the specific relief sought and a date for a hearing on the motion;
- If filed by mail, include a cover letter to the clerk with instructions regarding the filing and service of the motion; the clerk should be contacted beforehand to ensure filings by mail are permitted and to inquire if there are any special requirements for filing by mail; and
- Be served on all parties, with a courtesy copy sent to the judge and a copy for counsel's own records.

II. MOTION FOR CHANGE OF VENUE

The proper venue for a delinquency case is the parish where the alleged offense took place.[7] Upon motion of the child, district attorney, or on the court's own motion, a delinquency case can be transferred to the parish in which the child is domiciled.[8]

The court may, upon written motion by a party or on the court's own motion, transfer the case to the parish of proper venue or dismiss the petition altogether, if a petition has been filed in a parish of improper venue.[9] A motion for change of venue or for dismissal of the case based on improper venue is the proper response to a petition filed in the wrong parish.

If the petition is filed in the parish of proper venue, a change of venue may still be appropriate. A change of venue may be appropriate in high profile cases or cases in which the client cannot obtain a fair trial in the parish of proper venue. "A change of venue shall be granted if the court finds that, because of undue influence of an adverse party, prejudice existing in the public mind, or for any other reason, a fair and impartial trial cannot be obtained."[10] The court should consider, in making

7 La. Child. Code Ann. art. 805(A) (2006).
8 La. Child. Code Ann. art. 805(B) (2006).
9 La. Child. Code Ann. art. 806 (2006).
10 La. Child. Code Ann. art. 807(B) (2006).

its determination of change of venue, whether the testimony of witnesses will be affected at trial.[11] A motion for change of venue must be in writing and must be sworn to by the mover or his counsel before jeopardy has attached in the case.[12] The motion must set forth allegations of fact and must contain a statement averring that the motion is not being made for the purpose of delay but for the purpose of obtaining a fair and impartial trial.[13] The motion must be resolved in a contradictory hearing, unless waived by the district attorney and the child.[14] If the motion is granted, the case can be transferred to any parish in the state and the child, if in custody, must be transferred to the detention center for that parish.[15]

III. MOTION FOR RECUSAL

A Motion for Recusal may be appropriate if there is reason to believe the judge has an interest in the particular case, is biased in any way against the client or is unable to act as an impartial arbiter. In some jurisdictions where there is only one judge presiding over juvenile cases, this may mean that a change of venue is appropriate, or that another judge not generally assigned to juvenile cases will preside over the case.

When weighing a decision regarding a Motion for Recusal, counsel should consider the prejudice that the judge's interest will have on the outcome of the client's case. In some jurisdictions, the judge assigned, although potentially biased in some way, is likely to be the most sympathetic to the circumstances of the case. In addition, if the motion is denied, counsel will be stuck with the judge as the trier of fact and final arbiter. Counsel must be certain of the basis of the bias and the reality of the prejudice against the client before undertaking such a motion. However, if the judge has a true connection to the victim, complaining witnesses or an interest in the outcome of the case, there may be little choice other than to request her recusal.

IV. MOTION FOR DISCOVERY

As discussed in the previous chapter, discovery is an essential tool in the preparation of a client's case. A written Motion for Discovery should specify all possible relevant materials. In addition to the filing of a motions for discovery, other discovery related motions should be considered.

11 *Id.*
12 La. Child. Code Ann. art. 807(A) (2006).
13 *Id.*
14 *Id.*
15 La. Child. Code Ann. art. 807(C) (2006); *see also* La. Code Crim. Proc. Ann. art. 623–627 (2006).

A. Motion for Bill of Particulars

When the petition fails to provide detailed allegations against a client, a Motion for a Bill of Particulars requesting that the district attorney set forth with more particularity and specificity the "nature and cause of the allegations charging that the client committed a delinquent act" ought to be filed.[16] A Motion for a Bill of Particulars should become a standard discovery motion for counsel to gain more information regarding the allegations against the client. An attorney should argue that the original petition does not provide sufficient detail to adequately prepare a defense.

The court may order supplemental bills of particulars at any time preceding the adjudication.[17] All bills of particulars must be filed with the clerk of court and a copy must be provided to the child or his counsel.[18]

If the defects of the petition are not cured by the bills of particulars and the court determines that, based on the bills of particulars and the petition, no delinquent act was committed or that the child named did not commit the delinquent act charged, the court shall dismiss the petition.[19] The court may also dismiss the petition if the district attorney fails to provide a supplemental bill of particulars which cures the defects of the petition and earlier bills of particulars filed within the time set by the court.[20] The time period set by the court for the filing of a bill of particulars may not exceed three days from the date of the court's order.[21]

B. Additional Discovery Motions

In addition to a general discovery motion, discussed in the previous chapter, and a Motion for a Bill of Particulars, the following Motions may be helpful discovery tools. Keep in mind that in many cases, a number of the following motions will be relevant and essential discovery tools in the case. In such cases, a compilation of the following relevant motions can be integrated into one general discovery motion.

1. Motion for Additional Discovery

If, through preliminary discovery responses by the prosecutor or through investigation, it is found that there are additional documents or pieces of evidence that have not been provided and are in the control of the State, a Motion for Additional Discovery is appropriate. Such a motion is also necessary when the district attorney advises the defense counsel of the discovery of new evidence.

16 La. Child. Code Ann. art. 870(A) (2006).
17 La. Child. Code Ann. art. 870(C) (2006).
18 La. Child. Code Ann. art. 870(B) (2006).
19 La. Child. Code Ann. art. 871(A) (2006).
20 La. Child. Code Ann. art. 871(C) (2006).
21 La. Child. Code Ann. art. 871(B) (2006).

2. Motion for In Camera Inspection

In circumstances in which the prosecutor fails to turn over certain requested documents stating that they are privileged or not discoverable, or in cases in which certain potentially crucial evidence may be confidential records regarding a victim or witnesses, it may be appropriate to file a Motion for *In Camera* Inspection requesting that the judge review such documents in confidence to assess whether they are privileged and whether they contain evidence relevant to the client's defense. The court can then make a determination regarding whether such evidence should be turned over.

3. Motion to Quash Subpoena

In certain circumstances, an inappropriate or improper subpoena may be issued to a witness or to a client or his family which will prejudice the client's case. In such cases, a Motion to Quash the Subpoena may be appropriate.

4. Motion for a List of State Witnesses

Obtaining a list of the prosecutions witnesses is a crucial component of the discovery process. It will be important to obtain this list of witnesses for the purpose of investigation and preparation for cross-examination.

5. Motion for Disclosure of Plea Agreements and Preferential Agreements with Witnesses

The United States Supreme Court has held that a defendant is entitled to discovery regarding the existence and content of any plea agreements with co-defendants or preferential agreements with witnesses.[22] Such information is crucial for the preparation of cross-examination and for essential information for potential impeachment.[23]

6. Motion for Disclosure of Mental Health Records of Complaining Witnesses

In some cases, a complaining witness's mental health records may be relevant to the defense of a client's case. In cases in which the client is alleging self-defense or alleging that the complaining witness was complicit in the delinquent act, or if the mental health of the victim is otherwise relevant to the defense, a motion should be filed requesting the mental health records of the complainant.

7. Motion for Funds to Hire Expert Witnesses

If it has been determined that an expert witness is necessary for the adequate preparation of or presentation of a client's case, file a Motion for Funds to Hire an Expert Witness. Such a motion can be filed *ex parte;* however, if counsel intends to call the expert as a witness, he will have to advise the prosecution of the expert, along with his other witnesses, when requested.

22 *Giglio v. United States,* 405 U.S. 150, 153 (1972); *Brady v. Maryland,* 373 U.S. 83 (1963).
23 *United States v. Sanfilippo,* 564 F.2d 176, 178 (5th Cir. 1977).

Expert witnesses may be crucial at sanity commission hearings, preliminary hearings, adjudication and disposition, depending on the circumstances of the client's case. Be creative in the use of experts for psychological and mental health opinions and evaluations, forensic examinations of evidence, or other expert fields that may be relevant to the case. Do not feel confined by the budgetary limitations of the parish. The client is entitled to adequate representation and, if the client is indigent, the State must provide the necessary resources to provide such representation.[24] If budgetary constraints are a serious issue, it may become necessary to aggressively advocate for the expert funds and even to file a supervisory writ if the request is denied due to inadequate funds.

8. Motion for a Free Transcript

Such a motion is essential in cases in which witness testimony was heard in preliminary hearings. Having a transcript of prior testimony will be crucial in preparation for cross-examination and potential impeachment, in the event a witness alters her testimony at adjudication or a later hearing. If the client is indigent, such a transcript should be provided free of cost.

9. Motion for Discovery and Inspection of Scientific Tests and Reports

The initial discovery request should include a request for information regarding any scientific tests and reports completed in the client's case. In addition, in certain circumstances, it may be important to inspect certain tests and even to have an independent expert inspect such reports to provide a second opinion on their accuracy. In such situations, counsel should file a motion requesting inspection or requesting access to samples or evidence for an independent evaluation or testing.[25]

10. Motion for Funds to Hire a Private Investigator

If the office does not have access to staff investigators and the office does not have the funding to hire an investigator and one is needed in the case, file a motion requesting that the court provide funds for the hiring of an investigator. In many cases, having assistance from a professional investigator is crucial to the outcome of the client's case.

C. Failure to Comply With Discovery: When the Prosecutor Fails to Timely Respond to Discovery Requests

Once the motions for discovery have been filed and the court has ruled that responses must be tendered to the child's counsel by a certain date, mark a calendar with that date and be ready to file necessary motions for sanctions if the state fails to comply with the court order. Because of the expedited nature of delinquency cases, it is important to be prepared to take action immediately when discovery orders are not complied with.

24 *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).
25 La. Code Crim. Proc. Ann. art. 719 (2006).

The motions which are appropriate if the state fails to timely tender discovery responses are a Motion to Compel Discovery, Motion to Show Cause, and a Motion for Sanctions. These motions can also be consolidated into one motion which requests alternative relief.

1. Motion to Compel

Generally speaking, a Motion to Compel is the first step if a discovery order has not been complied with. The Motion should set forth facts alleging that the prosecutor has failed to comply with the court's discovery order and requesting that the court compel the prosecutor to comply with the discovery order by tendering discovery responses within a specified time period—preferably immediately or within a few days.

2. Motion to Show Cause

The Motion to Show Cause provides that the prosecutor has failed to comply with the discovery order and requests that the court order the prosecutor to show cause why he should not be held in contempt of court for his failure to comply. The State must then provide cause for its failure to timely tender discovery. If the State cannot show cause, the court will then hold the prosecutor in contempt of court for failure to comply with the court order.

3. Motion for Sanctions

Finally, a Motion for Sanctions requests certain specified sanctions for the State's failure to comply with discovery. These sanctions may include that the State not be permitted to present any evidence at adjudication which has not been tendered to the defense counsel. While the court cannot dismiss the State's case for failure to tender discovery, it can bar the presentation of undisclosed evidence which can leave the state with no evidence, and no choice but to dismiss the petition.[26]

A Motion for Sanctions is also appropriate if it is discovered that evidence has been destroyed by the prosecutor, or that the prosecutor has been instructing witnesses not to talk to the child's attorney or investigators.[27]

26 La. Code Crim. Proc. Ann. art. 729.5 (2006).

27 Randy Hertz, Martin Guggenheim & Anthony G. Amsterdam, Trial Manual for Defense Attorneys in Juvenile Court 188 (1991).

V. MOTIONS TO DISMISS

Other essential motions to consider in delinquency representation are Motions to Dismiss. The role of the juvenile defender is to ensure due process for her client and to hold the State to its burdens of proof and process. When the State has failed to present sufficient pleadings or facts to sustain its allegations against a client or has violated other essential procedural requirements, a Motion to Dismiss should be considered.

The Children's Code provides that "[a]ll objections to the proceedings, including objections based on defects in the petition and defenses capable of determination as a matter of law, may be raised by motion to dismiss."[28] The Code further provides that, "[f]or good cause, the court may dismiss a petition on its own motion, on the motion of the child, or on the motion of the petitioner. The court shall dismiss a petition on the motion of the district attorney."[29]

Possible bases for a Motion to Dismiss include:

1) **Failure to State an Offense:** The petition fails to state an offense which constitutes a delinquent act or fails to allege facts that make out every element of the charged offense.

2) **Lack of Jurisdiction:** The court lacks jurisdiction over the case.

3) **Improper Venue or Failure to Establish Venue:** Venue in the parish in which the petition was filed is improper or the petition fails to allege facts that establish venue.

4) **Lack of Specificity of Allegations:** The allegations in the petition and any corresponding bills of particulars are not set forth with sufficient specificity to prepare adequately for a defense.

5) **The Prescriptive Period Has Elapsed for the Filing of Delinquency Allegations:** The petition was not filed within the timeframes allowed by law, given the specific delinquent acts alleged.

6) **Double Jeopardy:** Jeopardy has attached in another case involving the same allegations.

7) **Denial of the Right to Speedy Trial:** The adjudication has not been held within the times provided by law for the holding of an adjudication hearing.

In a delinquency case, the Children's Code provides that an adjudication hearing must be held within 30 days (from the child's appearance to answer the petition) if the child is held in custody, or within 90 days if

28 La. Child. Code Ann. art. 875 (2006).
29 La. Child. Code Ann. art. 876 (2006).

the child is not held in custody.[30] If the adjudication is not timely held, the Code provides that the court shall release the child from custody and dismiss the petition.[31] However, the court may extend the period during which the adjudication must be held for "good cause."[32] The right to a speedy trial is also guaranteed by the United States Constitution. [33]

If a client is being held in custody, or if delays in the adjudication are the fault of the prosecution, counsel should enforce the timelines for adjudications in delinquency matters by filing a motion to dismiss for denial of right to speedy trial or for want of prosecution.

However, if a client is released pending adjudication, it may be in the client's best interest to delay the actual adjudication as long as possible to provide the client the opportunity to exhibit positive behavior such as complying with the terms of release from detention, going to school, and proving that he can stay out of further trouble with the law. This can provide a compelling argument for a disposition or probation or non-secure placement if the child is later adjudicated delinquent.[34]

8) **Social Reasons:** For "good cause" the court may dismiss a delinquency allegation. This provides great discretion to the court to consider any compelling social reasons that might merit dismissal of a delinquency petition. Although a dismissal for social reasons is a rarity, a court may be compelled to dismiss a case when a) the offense alleged is minor; b) the child has little or no prior record; and c) the child attends school and is not posing a behavior problem,[35] or if other compelling or sympathetic circumstances exist in the case.

9) **For Want of Prosecution:** If the district attorney requests a continuance of the adjudication, a motion for dismissal for want of prosecution is appropriate. This situation often presents itself at the adjudication hearing itself when the prosecutor finds himself unprepared or when his essential witnesses fail to appear. In such situations, an oral motion to dismiss for want of prosecution is appropriate specifying the prejudice to the child and the denial of his right to a speedy trial under the Federal and State Constitutions and under the Children's Code.

30 La. Child. Code Ann. art. 877(A)-(B) (2006).
31 La. Child. Code Ann. art. 877(C) (2006).
32 La. Child. Code Ann. art. 877(D) (2006).
33 U.S. Const. amend. VI; U.S. Const. amend. XIV; *see also Klopfer v. North Carolina,* 386 U.S. 213 (1967).
34 Hertz et al., *supra* note 27, at 411.
35 Hertz et al., *supra* note 27, at 458.

VI. MOTION FOR SEVERANCE OF CAUSES

The Children's Code permits the joinder of multiple allegations of delinquency against one child or the joinder of allegations against multiple children involved in the same delinquent act.[36] However, if it appears that the child or State is prejudiced by the joinder of allegations in a single delinquency petition, the court may order separate adjudication hearings, grant severance, or provide other relief as justice requires.[37] If the petition alleges the involvement of two juveniles, the cases of those juveniles can be severed and adjudicated separately if the state so chooses or, upon motion of the child and after contradictory hearing, the court determines that justice requires a severance.[38] A petition containing separate allegations against the same child can also be severed.[39] A motion for severance in such a situation may be beneficial to a client if the allegations are for two separate incidents and his attorney believes that an adjudication involving both incidents will prejudice the client. In many jurisdictions, however, the same juvenile judge may be destined to hear both cases, anyway, making a motion on such grounds irrelevant.

VII. MOTIONS TO SUPPRESS

The Louisiana Children's Code provides that a "child may move to suppress evidence obtained in violation of the Constitution of the United States or the Constitution of Louisiana."[40] All evidence obtained from the State through discovery should be closely analyzed with suppression in mind. Any evidence that provides a basis for challenge should be challenged through a Motion to Suppress. Each piece of State evidence that is suppressed only strengthens a client's case and may even pressure the district attorney to drop the charges. In addition, suppression hearings can be an invaluable discovery tool by forcing the State to present witnesses and facts to prove that the evidence in question was lawfully obtained. When a challenge is made regarding the constitutionality of the method of obtaining physical evidence, confessions or identifications, it actually becomes the burden of the State to prove that it obtained such evidence lawfully. This creates an ideal opportunity to force the State to put on a case on these issues, thus exposing the State's strengths and weaknesses as to the allegations against a client.

36 *See* La. Child. Code Ann. art. 873, 874 (2006).
37 La. Child. Code Ann. art. 873(A) (2006).
38 La. Child. Code Ann. art. 874 (2006).
39 La. Child. Code Ann. art 873(B) (2006).
40 La. Child. Code Ann. art. 872 (2006).

A. Motion to Suppress Physical Evidence

Warrantless searches and seizures are *per se* unreasonable under the Fourth Amendment of the United States Constitution[41] as made applicable to the states through the Fourteenth Amendment.[42] Accordingly, the government may not introduce any evidence obtained as a result of a warrantless search and seizure unless it can prove that a valid exception to the warrant requirement applies in the case. The exceptions to the warrant requirement are:[43]

1) The search was made with the valid consent of an authorized person;[44]

2) The search was made incident to a lawful arrest;[45]

3) The search was made under exigent circumstances;[46]

4) The search was of an operable motor vehicle and there was probable cause to believe that the vehicle contained criminal objects;[47]

5) The objects seized were in plain view;[48]

6) The search and seizure was generally reasonable and the intrusion on the Fourth Amendment rights of the individual was minimal;[49]

7) The police conduct has not been and could not practicably be subject to the warrant requirement;[50]

8) Other exceptional circumstances in which "special needs, beyond the normal need for law enforcement, make the warrant...requirement impractical."[51]

However, even if the circumstances of the case seem as though they may fall into one of the warrant exception categories, it may be beneficial to force the State to prove the exception and to utilize the hearing to gain additional discovery and to have an opportunity to cross-examine the State's witnesses.

41 *Katz v. United States,* 389 U.S. 347, 357 (1967); *Thompson v. Louisiana,* 469 U.S. 17, 19–20 (1984); *State v. Knight*, 574 So.2d 483 (La. App. 4th Cir. 1992); *State v. Lassere,* 95-1009 (La. App. 5th Cir. 10/01/96); 683 So.2d 812.
42 *Mapp v. Ohio,* 367 U.S. 643 (1961).
43 Hertz et al., *supra* note 27, at 523.
44 *Washington v. Chrisman,* 455 U.S. 1, 9–10 (1982).
45 *United States v. Robinson,* 414 U.S. 218 (1973); *Gustafson v. Florida,* 414 U.S. 260 (1973).
46 *Warden v. Hayden,* 387 U.S. 294 (1967) (approving a building entry by officers without a warrant while in "hot pursuit" of a fugitive).
47 *Carroll v. United States,* 267 U.S. 132 (1925); *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973).
48 *Harris v. United States,* 390 U.S. 234, 236 (1968); *see also Arizona v. Hicks,* 480 U.S. 321, 325 (1987).
49 *United States v. Place,* 462 U.S. 696, 703 (1983).
50 *Terry v. Ohio,* 392 U.S. 1, 20 (1968); *see also Delaware v. Prouse,* 440 U.S. 648, 653–655 (1979); *Michigan v. Summers,* 452 U.S. 692, 699–701 (1981).
51 *O'Conner v. Ortega,* 480 U.S. 709, 720 (1987) (plurality opinion); *see also Griffin v. Wisconsin,* 483 U.S. 868 (1987); *New Jersey v. T.L.O.,* 469 U.S. 325 (1985).

B. Motion to Suppress a Confession or Statement

There is a great deal of information on adolescents in the justice system which suggests that confessions by children are unreliable, because children are particularly susceptible to coercion, pressure and subtle interrogation techniques. In addition to reliability concerns, the admissibility of statements of children with respect to their Fifth Amendment and Miranda rights is particularly vulnerable to attack because of a child's relative incapacity to waive their rights knowingly, voluntarily and intelligently.[52]

1. Suppression of Statements When No Miranda Warning Was Given

Statements elicited in the absence of a knowing, voluntary and intelligent waiver of Miranda rights must be suppressed.[53] The government bears a heavy burden of establishing that a suspect waived his constitutional rights, knowing them, understanding them, and understanding the consequences of the waiver.[54] Where a defendant makes a statement without having been advised of his Miranda rights, that statement may not later be used against him if: (1) the defendant was in custody at the time the statement was made; and (2) the statement was made in response to interrogation or its functional equivalent.[55] Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way."[56] Therefore, if a client was taken into custody without being advised of his Miranda rights, his subsequent statements should be suppressed.

2. Knowing, Intelligent and Voluntary Waiver of Rights

Separate from the issue of compliance or non-compliance with advising of Miranda rights, a statement made by an accused is not admissible unless it was made knowingly, intelligently and voluntarily. The voluntariness of a statement turns on whether the statement was "the product of an essentially free and unconstrained choice by its maker."[57] The standard formulation of the voluntariness test was set out by the Supreme Court of the United States in *Bram v. United States*:

> [A] confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by the exertion of any improper influence.... A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner,

52 Thomas F. Geraghty & Will Rhee, *Learning from Tragedy: Representing Children in Discretionary Transfer Hearings*, 33 Wake Forest L. Rev. 595, 630 (Fall 1998).
53 *Miranda v. Arizona,* 384 U.S. 436 (1966); *see also State v. Fernandez,* 96-2719 (La. 04/14/98); 712 So.2d 485.
54 *Tague v. Louisiana,* 444 U.S. 469 (1980); *Fernandez*, 712 So.2d at 487-88.
55 *Miranda,* 384 U.S. at 479; *Rhode Island v. Innis,* 446 U.S. 291, 301 (1981).
56 *Miranda,* 384 U.S. at 444.
57 *Culombe v. Connecticut,* 367 U.S. 568, 602 (1961); *Schneckloth v. Bustamonte,* 412 U.S. 218, 225-26 (1973).

and therefore excludes the declaration if any degree of influence has been exerted.[58]

Involuntariness may be shown not only by physical coercion, *Brown v. Mississippi*,[59] but by a variety of other more subtle types of psychological coercion.[60]

Voluntariness turns solely on the circumstances surrounding the confession, and not the probable trustworthiness of the statement.[61] The prosecution has the burden of proving beyond a reasonable doubt that the defendant's confession was voluntary.[62] Any statements made by the defendant that were involuntarily made cannot be used for impeachment or any other purpose by the prosecution at trial.[63]

To meet its burden, the State must affirmatively prove not only that the waiver was voluntary, but also that it constituted "a knowing and intelligent relinquishment or abandonment of a known right or privilege."[64] Factors to be considered in determining whether a juvenile has knowingly and intelligently waived the privilege against self-incrimination include:

1) age of the accused;

2) education of the accused;

3) knowledge of the accused as to both the substance of the charge, if any has been filed, and the nature of his rights to consult with an attorney and remain silent;

4) whether the accused is held incommunicado or allowed to consult with relatives, friends or an attorney;

5) whether the accused was interrogated before or after formal charges had been filed;

6) methods used in interrogation;

7) length of the interrogation;

8) whether the accused refused to voluntarily give statements on prior occasions; and

58 *Bram v. United States,* 168 U.S. 532, 542-43 (1897).
59 *Brown v. Mississippi,* 297 U.S. 278 (1936).
60 *See Mincey v. Arizona*, 434 U.S. 1343 (1977) (holding that inculpatory statements obtained during a hospital interview of wounded suspect after deputies ignored his request for an attorney were involuntary); *Jurek v. Estelle*, 623 F.2d 929 (5th Cir. 1980) (en banc).
61 *See Rogers v. Richmond*, 365 U.S. 534, 540-44 (1961); *Jackson v. Denno*, 378 U.S. 368, 376-77 & 383-86 (1964).
62 *State v. Jackson*, 414 So. 2d 310 (La. 1982).
63 *Mincey v. Arizona*, 434 U.S. at 1398 (holding that "*any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law") (emphasis added).
64 *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *see also Tague v. Louisiana*, 444 U.S. 469 (1980) (affirming that government has the burden to prove knowing and intelligent waiver of constitutional rights); *Illinois v. Allen*, 397 U.S. 337, 343 (1970) ("[C]ourts must indulge every reasonable presumption against the loss of constitutional rights."); *Smith v. Illinois*, 469 U.S. 91 (1984) (holding that ambiguous statements were not sufficient to justify finding of waiver).

9) whether the accused has repudiated an extra judicial statement at a later date.[65]

Although not required for a valid waiver, a parent's signature on a Miranda waiver form is another factor to consider. In evaluating whether a confession or statement was given knowingly and voluntarily, a court must consider the "totality of the circumstances" in which the statement was given.[66]

3. Suppression of Statements Made After Request for Counsel

Any statements or confessions made after a child has requested the assistance of counsel should also be suppressed. "The request need not be formal or direct."[67] Once the accused asserts his rights, his rights must be "scrupulously honored."[68] Once the accused invokes his right to counsel, "the interrogation must cease *until an attorney is present*."[69] In *Edwards v. Arizona*, the Court stated:

> We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.[70]

"Good faith" on the part of the sheriff is not relevant, "because once the defendant has expressed his desire to deal with the police only through counsel, all successive officers who deal with the defendant are held to have knowledge of this fact."[71]

C. Motion to Suppress an Identification

The Fifth Amendment of the United States Constitution prohibits the admission at trial of identification testimony where the circumstances of the identification are "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[72] An in-court identification may be tainted by an impermissible out-of-court identification where there is no independent source for the identification other than the impermissibly suggestive out-of-court identification. The prosecution can only elicit an in-court identification under such circumstances by showing through clear and convincing evidence that the in-court identification rests on a source independent of the illegal pretrial identification procedures.[73] An in-court identification may only

65 *State v. Fernandez*, 96-2719 (La. 04/14/98); 712 So.2d 485, 489 n.5 (citing *In re Dino*, 359 So.2d 586, 591).
66 *Fernandez*, 712 So.2d at 490.
67 *State v. Abadie*, 612 So.2d 1 (La. 1993).
68 *Michigan v. Mosley*, 423 U.S. 96 (1975).
69 *Miranda v. Arizona*, 384 U.S. at 474 (emphasis added).
70 *Edwards v. Arizona*, 451 U.S. at 484-85; *see also Brewer v. Williams*, 430 U.S. 387 (1977).
71 *State v. Arceneaux*, 425 So.2d 740, 744 (La. 1983).
72 *Simmons v. United States*, 390 U.S. 377, 384 (1968); *see also United States v. Wade*, 388 U.S. 218 (1976); *State v. Martin*, 595 So.2d 592 (La. 1992).
73 *United States v. Wade*, 388 U.S. at 239-41; *Clemons v. United States*, 408 F.2d 1230, 1237 (D.C. Cir. 1968) (en banc), *cert.*

be made if the government can point to an indicia of reliability sufficient to justify its admission.[74]

It is well settled that the Due Process Clause of the Fourteenth Amendment protects an accused against the admission of unreliable identification evidence. Such evidence must be excluded where the totality of the circumstances indicate that the entire identification process was unreliable, and thus resulted in a substantial likelihood of misidentification.[75]

VIII. MISCELLANEOUS PROCEDURAL MOTIONS

A. Motion for Continuance

Although juvenile proceedings are expedited, and it is generally the role of counsel for the child to enforce the timelines and to try to resolve cases for juvenile clients as quickly as possible, there are times when a Motion for Continuance may be necessary. It is crucial that defense counsel be adequately prepared for the adjudication and that the child have the best opportunity for a positive outcome and dismissal of the charges against him. If necessary documents cannot be procured or crucial witnesses located, additional time may be requested from the court to complete such preparatory measures. If a client is in detention pending adjudication, avoid continuances and make every effort to proceed with the case at the earliest possible time. If, however, the client is not in detention, a continuance likely will not prejudice the client and may even help his case by allowing him additional time out of detention to make a good impression on the court.

If the district attorney is granted leave to amend his petition to include new allegations of delinquency, the Children's Code provides that the child may request a continuance of the adjudication hearing and such continuance "may be granted for such period as is required in the interest of justice."[76] If the district attorney adds new allegations against a client to the petition, there may be a need for additional time to investigate the new allegations and to obtain additional discovery.

B. Motion for Extension of Time to File Pre-Adjudicatory Motions

As discussed earlier in this chapter, pre-adjudicatory motions must be filed within 15 days of the date a client appears to answer the allegations against him. However, if additional information is obtained through discovery or through investigation beyond this time period, or if other circumstances present themselves which require the filing of a pre-adjudicatory motion beyond the 15 days, file a Motion for Extension to File Pretrial Motions or a Motion for Leave to File Additional Pretrial

denied, 394 U.S. 964 (1969).

74 *Manson v. Brathwaite,* 432 U.S. 98 (1977); *Neil v. Biggers,* 409 U.S. 188 (1972); *State v. Martin,* 595 So.2d 592 (La. 1992).

75 *Biggers,* 409 U.S. at 198; *Simmons,* 390 U.S. at 384.

76 La. Child. Code Ann. art. 846 (2006).

Motions. Permission for the filing of such motions is entirely within the discretion of the judge, but should be given when the interest of justice requires. Make sure to include details regarding the need for the filing of an untimely motion in a pleading and summarizing the substance of what the motion would provide if filed so that the record can be preserved for appeal. A defendant has the right to a fair trial and effective assistance of counsel, and any limitation on pre-adjudicatory motions that restricts these rights should be challenged through a supervisory writ.

C. Creative Motions Practice

Do not limit yourself to the motions described in this chapter. There are many other pre-adjudicatory motions that may benefit a client and his case. Consider motions regarding court proceedings and court inspection of the crime scene, motions to obtain mental health and medical services for a client, motions of recusal of the district attorney when appropriate, motions for funds for hiring of co-counsel in complicated cases, and any other motion that may further a client's cause. There are no limitations to the number and type of motions that can be filed in a case except as good faith and professionalism provide.

IX. SUPERVISORY WRITS ON PRE-ADJUDICATION RULINGS

If pretrial motions are wrongly denied by the court, seek supervisory writs to obtain appellate review of the judge's denial before the completion of the case. Rulings on motions regarding issues such as the suppression of evidence, opportunities to file additional necessary motions, motions to dismiss and others may change the outcome of the case. The only exception to the benefit of the filing of a supervisory writ is when it appears that the delay caused by the writ process would prejudice the client and the issue will be preserved for appeal even without a writ. *Chapter 19: Appeals and Extraordinary Writs* explains the Louisiana supervisory writ process in detail.

Every transfer is a tragedy. It is a tragedy for the children, many of whom have already experienced too much tragedy in their young lives and now must face the harsher penalties of the criminal court. It is also a tragedy for the juvenile court system, which in many cases has failed to rehabilitate the child and now must surrender the child to the criminal court.[1]

1 Thomas F. Geraghty & Will Rhee, *Learning from Tragedy: Representing Children in Discretionary Transfer Hearings,* 33 Wake Forest L. Rev. 595 (Fall 1998).

CHAPTER 14
TRANSFERS TO ADULT COURT

In Louisiana, children as young as 14 years of age may be transferred to adult criminal court. In the past, transfers were reserved for extraordinary cases in which chronic and serious young offenders had demonstrated that they would not benefit from the rehabilitation services and programs available in juvenile court. Recently, however, the trend has been toward transferring youth to adult prisons, despite evidence that juvenile crime is on the decline.[2]

Louisiana law already requires automatic criminal prosecution of children 15 and older for the most violent crimes and grants prosecutors broad discretion to charge juveniles as adults for numerous additional crimes. The transfer statute further extends the reach of adult criminal prosecution for children with devastating consequences, making the need for truly zealous advocacy by juvenile defenders crucial when a child is facing transfer. This chapter discusses the transfer and waiver processes in Louisiana and outlines methods for advocacy at transfer hearings.

I. TRAGIC CONSEQUENCES OF TRANSFER

The transfer of youth into adult courts and prisons has severe consequences.[3] As one defender aptly described it, for nearly all children transferred to adult court, "it is a death blow to any opportunity for a meaningful life."[4] The immediate result of a transfer order is for the transferred youth to be directly moved to an adult jail.[5] If convicted, the youth is then permanently incarcerated with adults. Common sense

2 "In the closing decades of the 20th century, America began to fear its youth. Legislators and commentators spoke ominously of a nation under siege by a rising generation of superpredators. Americans were convinced that youth violence was out of control—and that it was bound to get worse. In response, 46 of the 50 states made significant changes in laws targeting juveniles: They expanded the circumstances under which defendants as young as 10 years of age could be tried in criminal courts, and they allowed adolescents to receive criminal punishments as high as life imprisonment without the possibility of parole." Jeffrey Fagan & Franklin E. Zimring, eds., John D. and Catherine T. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, Executive Summary to Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court (Jan. 22, 2006), *available at* www.mac-adoldev-juvjustice.org/changingbordersfinal.pdf. "The number of delinquency cases judicially waived to criminal court peaked in 1994 with 12,100 cases. This represented a 45% increase over the number of cases waived in 1990 (8,300). Since 1994, however, the number of cases waived to criminal court declined 38% to 7,500 cases, representing less than 1% of the formally processed delinquency caseload." Charles M. Puzzanchera, *OJJDP Fact Sheet: Delinquency Cases Waived to Criminal Court, 1990–1999* (Sept. 2004), *available at* www.ncjrs.gov/pdffiles1/ojjdp/fs200304.pdf.

3 "Obviously the difference [between adult and juvenile correctional facilities] is one of tremendous consequences requiring careful and meticulous attention to proper safeguards designed to implement the State policy of noncriminal treatment of children under 17 years of age." *In re Smith,* 359 So.2d 1271, 1275 (La. 1978).

4 Stephen K. Harper, *Representing Children Facing Transfer,* Louisiana Public Defender Association Criminal Litigation Seminar (Nov. 19–20, 1999).

5 Prior to entry of a transfer order, the youth shall be held in custody only in those places authorized for the pre-adjudication detention of children as specified in Article 822 of the Children's Code. However, after transfer, the child shall be held in

and experience tells us that housing children with adult criminals puts the child at extraordinary risk of abuse and brutality.[6] Research shows that youth in adult facilities are five times more likely to be the victims of sexual abuse, 50 percent more likely to be the victim of assault and have higher rates of suicide than similar youth who remain in the juvenile justice system.[7] Furthermore, because rehabilitation is not the purpose of the adult system, transferred youth have little, if any, chance to turn their lives around once convicted in the adult criminal court.[8]

Another consequence of a transfer of juvenile jurisdiction is that once transferred, the district court cannot transfer the child back to juvenile court. Unlike some other states, there is no reverse transfer in Louisiana even when the child is ultimately convicted of a lesser charge.[9] Clearly then, the probable cause determination takes on added significance whenever the crime charged may qualify the child for a transfer or waiver.

Finally, there are long-term, life-changing consequences for transferred youth who are convicted of a felony. In addition to retaining a permanent criminal record, they lose the right to vote and hold public office; they cannot get a driver's license and other kinds of licenses; they may be displaced from their home if operated by a governmentally funded Housing Authority; and they face enormous barriers to future employment.[10]

II. HOW A CHILD MAY END UP IN ADULT CRIMINAL COURT

It is important to understand the transfer process in the context of all the ways in which juvenile jurisdiction may be divested in Louisiana. There are actually three ways that a juvenile can end up in adult criminal court: (1) legislative waiver; (2) prosecutorial waiver; and (3) transfer by the juvenile court judge after a hearing.[11] The first two mechanisms are resolved as jurisdictional matters. Keep in mind that

any facility used for pretrial detention of accused adults. La. Child. Code Ann. art. 864 (2006).

6 "The dreadful prospect of incarcerating a juvenile with murderers, rapists and other felons is a matter of common knowledge." *In re Smith,* 359 So.2d at 1275.

7 Kathleen Snavely, *States Catch Waiver Trend,* The Drug Policy Letter, No. 30:1 (Summer 1996).

8 "Thus, the unique nature of the juvenile system is manifested in its noncriminal, or 'civil,' nature, its focus on rehabilitation and individual treatment rather than retribution, and the state's role as *parens patriae* in managing the welfare of the juvenile in state custody." *In re C.B.,* 97-2783 (La. 03/11/98); 708 So.2d 391.

9 In *State v. Sheppard,* 371 So.2d 1135 (La.1979), a 16-year-old defendant was charged with first-degree murder and ultimately convicted of manslaughter. Defense counsel argued that the 1974 Constitution of Louisiana prevents the district court from retaining jurisdiction over a juvenile charged with a capital offense or attempted rape once a responsive verdict is returned. Despite the disturbing fact that this juvenile was in adult court for no other reason than that the State overcharged him with a capital offense, the Court held that the district court retains jurisdiction when the juvenile either pleads guilty to or is convicted of a lesser included offense. *See also State v. Hamilton,* 96-0107 (La. 1996); 676 So.2d 1081, 1083; La. Child. Code Ann. art. 863 (2006).

10 Though transfer to adult courts has serious detrimental consequences for youth, some scholars have found a few possible arguments favoring transfers, including having the right to a trial by jury and prosecution only on indictment by a grand jury; and, in some cases, being eligible for a sentence less severe than he would have received if prosecuted as a juvenile delinquent (because sentencing in adult court is governed by statutory maximum terms graduated according to the severity of offenses, rather than following the discretionary juvenile court model).

11 Though this chapter briefly describes the Article 305 transfers, it focuses on the Article 857 transfer mechanism.

once waived or transferred, the criminal court's jurisdiction is irreversible and continues throughout all subsequent consideration of the charges.[12]

A. Legislative Waiver

The "legislative waiver" is automatic; that is, the adult district court has original jurisdiction over children age 15 or older at the time of the commission of one of four enumerated offenses:[13]

(1) first-degree murder;

(2) second-degree murder;

(3) aggravated rape; and

(4) aggravated kidnapping.

When probable cause is found that the juvenile committed one of these four offenses, by either an indictment or a probable cause or continued custody hearing in juvenile court, the jurisdiction of the criminal court automatically vests. The continued custody hearing in juvenile court consequently becomes a critical point for determining the child's future under such circumstances. For this reason, probable cause should be vigorously contested in any case involving potential legislative waiver.[14] Once probable cause is established in juvenile court, the juvenile may be moved and held for trial in any facility used for the pretrial detention of adults.[15] All further proceedings in the child's case will then be held in criminal court, and the child will face adult sanctions if found guilty.

B. Prosecutorial Waiver

"Prosecutorial waiver," also known as "direct file," is discretionary for children age 15 or older at the time of the commission of one of 13 enumerated offenses.[16] The 13 qualifying offenses are:

(1) attempted first-degree murder;

(2) attempted second-degree murder;

(3) manslaughter;

(4) armed robbery;

(5) aggravated burglary;

(6) forcible rape;

12 La. Child. Code Ann. art. 305(A)(2) and 305(D) (2006).
13 La. Child. Code Ann. art. 305(A) (2006).
14 Several cases have challenged the constitutionality of the automatic divestiture of juvenile court jurisdiction on different grounds without success. *See State v. Perique,* 439 So.2d 1060 (La. 1983) (due process does not require a hearing prior to divestiture of jurisdiction); *State v. Foley,* 456 So.2d 979 (La. 1984) (Article 305 is a valid exercise of state's police power).
15 La. Child. Code Ann. art. 306(D) (2006)
16 La. Child. Code Ann. art. 305(B) (2006).

(7) simple rape;

(8) second-degree kidnapping;

(9) aggravated battery committed with a firearm;

(10) a second or subsequent aggravated battery;

(11) a second or subsequent aggravated burglary;

(12) a second or subsequent offense of burglary on an inhabited dwelling;

(13) a second or subsequent felony-grade violation of Part X or X-B of Chapter 4 of Title 40 of the Louisiana Revised Statutes of 1950 involving the manufacture, distribution or possession with intent to distribute controlled dangerous substances.[17]

The prosecutor's charging decision determines the forum in which the case will be tried. Upon arrest, as with the "legislative waiver," the juvenile can be held only in the type of facility authorized by Article 306 of the Children's Code until either an indictment is returned or the juvenile court finds probable cause in a continued custody hearing and a bill of information is filed. Again, should a continued custody hearing be held, the probable cause determination becomes the critical point of intervention for counsel.[18]

If a child is held in detention, the district attorney has 30 calendar days from the arrest to file the indictment, bill of information or petition, unless the child waives this right.[19] The Louisiana Supreme Court has held that, because the purpose of the time limitation is to avoid lengthy pretrial detention and to prompt the district attorney to make a speedy decision, the remedy for failure of the district attorney to make a timely election is releasing the child from detention.[20] In addition, there is authority for requiring a transfer hearing pursuant to Article 857 of the Children's Code at least in the instance where the district attorney initially files a petition in juvenile court and fails to make the election to prosecute in criminal court within 30 days.[21] Therefore, counsel for the juvenile should consider filing a Motion for a Transfer

17 *Id.*

18 *See State v. Dixon,* 98-0090 (La. App. 4th Cir. 06/03/98); 712 So.2d 1078 (defense stipulated to probable cause with a 15-year-old arrested on three counts of armed robbery and subsequently tried, unsuccessfully, to challenge the DA's decision to transfer the youth; court found that once probable cause was established, the assistant district attorney had a right under Article 305(B) to file a bill of information transferring the juvenile's case to criminal district court).

19 La. Child. Code Ann. art. 305(B)(3) (2006).

20 *State v. Hamilton,* 96-0107 (La. 1996); 676 So.2d 1081 (the district attorney initially filed a petition in juvenile court charging the 15-year-old with armed robbery, then changed his mind over a month later and filed a bill of information. The Court ruled that while the youth should be released, he would still be subject to further proceedings in criminal court).

21 Noting that the Supreme Court in *Hamilton* "misperceived" that the only remedy was release, at least one drafter of the Children's Code argues that: "[T]he timely filing of the juvenile court petition should have been construed as conferring jurisdiction upon the juvenile court which thereafter could have been divested only by a transfer proceeding. Paragraph (B)(3) expressly refers to the prosecutor's 'election' which at least implies a choice of one or two mutually exclusive initial jurisdictional paths: the juvenile court or the criminal court. In this sense, it is jurisdictional, and after having elected to file a petition in the juvenile court, the prosecutor's remedy would be to seek a transfer order from the juvenile court to the criminal court pursuant to Article 857." McGough & Triche, Louisiana Children's Code Handbook, Author's Notes, La. Child. Code Ann. art. 305 (2006).

Hearing in such instances and seek to put on evidence to show why the youth should remain in the juvenile system.

C. Judicial Waiver by Transfer Hearing

This chapter deals primarily with the third method of transfer to criminal court, the judicial waiver after a transfer hearing, authorized by Article 857 *et seq.* of the Louisiana Children's Code. This transfer mechanism allows the juvenile court on its own motion or on motion of the district attorney to consider the transfer of a 14-year-old juvenile[22] to criminal court for prosecution for certain enumerated offenses. These offenses include:

(1) first-degree murder;

(2) second-degree murder;

(3) aggravated kidnapping;

(4) aggravated rape;

(5) aggravated battery when committed by the discharge of a firearm;

(6) armed robbery when committed with a firearm; and

(7) forcible rape when committed upon a child at least two years younger than the rapist.[23]

These transfers differ from the Article 305 scheme in that the criminal court has no original jurisdiction and obtains jurisdiction only after a transfer hearing in juvenile court, at which the state must show by "clear and convincing" proof that there is "no substantial opportunity for the child's rehabilitation" through the juvenile system.[24] In contrast to the legislative or prosecutorial waivers, the youth actually has a chance to get the kind of treatment and rehabilitation that he or she needs when an individualized decision is made after a full transfer hearing by the court. Moreover, a 14-year-old youth transferred by this mechanism, if subsequently convicted in district court, cannot be incarcerated beyond his 31st birthday.[25]

III. THE ARTICLE 857 TRANSFER PROCESS

A. Transfer Decision Is of Constitutional Magnitude: Due Process Required

The decision to prosecute a child in adult criminal court who is otherwise eligible for juvenile court jurisdiction is momentous. The first juvenile court case to be decided by the United States Supreme Court, *Kent v. United States,* involved a transfer deci-

22 La. Child. Code Ann. art. 857(A) (2006) (the child must be 14 years old at the time of the commission of the alleged offense).
23 La. Child. Code Ann. art. 857(A) (2006).
24 La. Child. Code Ann. art. 862 (2006).
25 La. Child. Code Ann. art. 857(B) (2006).

sion.[26] In this landmark case, the Court held that the waiver of jurisdiction is a "critically important action" that determines "vitally important statutory rights of the juvenile" and must be accorded minimum due process to satisfy the United States Constitution.[27]

Kent was a 16-year-old who was already on probation when he was arrested and charged with a number of robberies, housebreaking and rape. Defense counsel sought a psychiatric evaluation and all social reports in the court's possession. These motions were never ruled on and presumably denied, and the juvenile court transferred Kent for trial as an adult without a hearing.[28] The Supreme Court asserted that the *parens patriae* philosophy of the juvenile court "is not an invitation to procedural arbitrariness."[29] Children facing transfer are entitled to basic due process protections, including access to social records and probation or similar reports which presumably are considered by the juvenile court.

> "[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons."[30]

Eleven years later, in Louisiana's first transfer challenge, the Louisiana Supreme Court held that the standards for transfer are of "constitutional magnitude" and articulated six criteria that were later codified in the Louisiana Children's Code and are discussed below.[31] In *State v. Everfield*, a 16-year-old juvenile defendant who was charged with armed robbery and transferred to district court challenged the constitutionality of the transfer statute. The court held that the statute was indeed constitutional, because the standards of procedural due process articulated in *Kent* were implicitly embodied in the statute.[32] These fundamental due process protections include:

> (1) a hearing which measures up to the essentials of due process and fair treatment;
>
> (2) effective assistance of counsel;
>
> (3) access by counsel to social records and probation or similar reports; and
>
> (4) a statement of reasons for which the juvenile is being transferred, including a statement of relevant facts for purposes of facilitating appellate review of the transfer determination.[33]

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26 *Kent v. United States,* 383 U.S. 541 (1966).
27 *Kent,* 383 U.S,. at 556.
28 A jury subsequently convicted Kent of housebreaking and robbery, but found him not guilty by reason of insanity on the rape charge. Kent was sentenced to 90 years in prison. *Id.* at 550.
29 *Id.* at 555.
30 *Id.* at 554.
31 *State v. Everfield,* 342 So.2d 648 (La. 1977); La. Child. Code Ann. art. 862 (2006).
32 *Everfield,* 342 So.2d at 655.
33 *Kent,* 383 U.S. at 561-62.

In subsequent cases, the Louisiana Supreme Court has reinforced *Kent*'s constitutional protections.[34]

B. Who Is Eligible for a Transfer?

A juvenile who is at least 14[35] can be transferred after a hearing in juvenile court if he is charged with any of seven offenses outlined in Article 857 of the Children's Code and listed above.[36] In *Everfield*, defense counsel for a 16-year-old juvenile charged with armed robbery issued a constitutional challenge to the arbitrary distinctions between which types of crimes qualify for transfer, and which do not. The Court held that it is not a violation of due process or equal protection to base the eligibility of transfer on crimes whose prescribed penalties are life imprisonment or, in the case of armed robbery, 99 years at hard labor without benefit of parole, probation or suspension of sentence.[37] The Court reasoned that the legislature's evaluation of the gravity of these types of crimes and their threat to public safety, as demonstrated by their respectively severe sentences, provide justification for transferring a young person into adult criminal court and even prison.[38] In this respect, *Everfield* leaves open the question of challenging the transfer statute with regard to those crimes which are not accompanied by similarly "severe" sentences.

C. Notice of Intent to Seek Transfer

Whenever a motion for transfer has been filed, the child and his custodian must have at least 10 days notice prior to the hearing on the motion. Notice must be written and include the time, place and purpose of the hearing.[39] Any motion for transfer must be filed following the filing of the delinquency petition, but prior to an acceptance of an admission on the petition or an adjudication hearing.[40] Defense counsel, therefore, may want to consider whether it makes strategic sense to push for arraignment ("answer") and advise the youth to "admit" to the charges. If the facts are especially damaging, counsel may want to get an admission on the record immediately and work with the district attorney for a plea in juvenile court as soon as possible, thereby avoiding the possibility of a transfer. As long as the state has not yet filed a motion for transfer, the child can no longer be transferred once he admits the charges in juvenile court.

34 *See State v. Bruno,* 388 So.2d 784 (La. 1980); *State v. Blouin,* 352 So.2d 1283 (La. 1977); *State v. Hall,* 350 So.2d 141 (La. 1977).

35 Defense counsel have challenged the constitutionality of allowing the legislature to draw arbitrary lines to decide at what age a juvenile may be eligible for transfer, but these cases have failed in both federal and Louisiana courts. *See Mason v. Henderson*, 337 F. Supp. 35 (1972) ("The distinctions between youth and age, slow and fast, safe and unsafe are all matters that must be fixed at some point. If the Constitution permits a line to be drawn, a statute drawing it does not become unconstitutional because cases may fall close to either side of the line."); *see also State v. Foley,* 456 So.2d 979 (La. 1984) (Classifications by age and seriousness of the offense are not arbitrary or capricious; they bear a rational relationship to the state's legitimate interest in giving the public enhanced protection from more violent felons); *State v. Leach,* 425 So.2d 1232 (La. 1983); *State v. Perique,* 439 So.2d 1060 (La. 1983).

36 La. Child. Code Ann. art. 857-64 (2006).

37 *State v. Everfield*, 342 So.2d at 653-54.

38 *Id.*

39 La.Child. Code Ann. art. 858(B) (2006).

40 La.Child. Code Ann. art. 858(A) (2006)

D. State's Burden of Proof and the *Everfield* Factors

At the transfer hearing, the prosecution must establish a *prima facie* case—similar to proving "probable cause"—that the youth committed a crime that warrants transfer, and then must present "clear and convincing" evidence that the youth is not "amenable to treatment" in the juvenile justice system.[41] In *Everfield,* the Court held that the decision that a juvenile is not amenable to treatment or rehabilitation must be based on a careful review of relevant considerations; the following considerations were articulated by the Court and have since been codified in the Louisiana Children's Code:

> (1) the age, maturity, both mental and physical, and sophistication of the child;
>
> (2) the nature and seriousness of the alleged offense to the community and whether the protection of the community requires transfer;
>
> (3) the child's prior acts of delinquency, if any, and their nature and seriousness;
>
> (4) past efforts at rehabilitation and treatment, if any, and the child's response;
>
> (5) whether the child's behavior might be related to physical or mental problems;
>
> (6) techniques, programs, personnel and facilities available to the juvenile court that might be competent to deal with the child's particular problems.[42]

The state must present evidence on each of these *Everfield* factors in order to demonstrate that the youth has "no hope of treatment or rehabilitation."[43]

41 La. Child. Code Ann. art. 862(A) (2006).

42 La. Child. Code Ann. art. 862(A)(2) (2006); *Everfield,* 342 So.2d at 655-56.

43 *Everfield,* 342 So.2d at 655. Since *Everfield,* numerous cases have expressly held that a court must have considered the now-codified six standards before a transfer can be valid. *See In re Smith,* 359 So.2d 1271, 1275 (La. 1978) (The determination [of whether to transfer a child] should explore every reasonable ground to assure the court that the juvenile cannot be treated or rehabilitated through facilities available to the juvenile court, and these matters must appear of record); *State v. Davis,* 32, 379 (La. App. 2d Cir. 09/22/99); 749 So. 2d 701 (affirming the transfer of a 14-year-old on armed robbery where record included reasons for ordering the transfer and reflected considerations of all the factors regarding amenability to treatment); *State v. Wilkerson,* 96-1965 (La. App. 1st Cir. 11/07/97); 704 So.2d 1 (14-year-old youth sentenced to life imprisonment for second-degree murder; applying the six factors listed in Children's Code Article 862(2) and *Everfield,* the reviewing court found that the juvenile court did not abuse its discretion in transferring the defendant to criminal court where the State had proven the requirements by clear and convincing evidence).

IV. REPRESENTING A CHILD FACING TRANSFER

"The right to representation of counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is the essence of justice."[44] The Louisiana Supreme Court has reaffirmed that due process requires effective assistance of counsel for a transfer hearing.[45] Although representing children in transfer proceedings is certainly challenging, it also provides a unique opportunity for creative advocacy. There are several questions counsel may want to keep in mind while developing a theory of the child and preparing the case:[46]

> (1) Who is this child, and what kinds of supports and strengths does he have?
>
> (2) What led to his getting in trouble, and what is his thinking about the situation?
>
> (3) What are his rehabilitative needs, and why have past efforts at rehabilitation been unsuccessful?
>
> (4) What specific programs and services are available within the juvenile system to treat his needs, and what is his prognosis if treated?
>
> (5) What is important to the judge, and how can this be incorporated to motivate the court to keep the child in the juvenile system?

A. Developing a Theory of the Child and Case

The central question for the court in a transfer hearing is: "Given the seriousness of the offense and the background of the child, should there be an effort to rehabilitate the child?" As counsel for the child, the theory of the case should explain why the answer to this question must be "YES." Bringing to life the story of the child—who he or she is, how this situation came to be and why rehabilitation is still possible—will be the goal of the transfer hearing. While some themes are common (i.e., immaturity, developmental issues, protection of the community, etc.), the unique situation of each child will provide direction for the best way to frame the case.[47]

The theory of the case should be a product of a sensible assessment of both the client and the circumstances surrounding the alleged offense. The development of a theory of the case should be a joint effort between defense counsel, the client and experts. Above all else, this framework must demonstrate that the child can be successfully treated within the remaining period of the juvenile court's jurisdiction.[48]

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44 *Kent,* 383 U.S. at 561.

45 *In re Bruno,* 388 So.2d 784, 787 (La. 1980).

46 Harper, *supra* note 4.

47 Finding a compelling reason for keeping the child in juvenile court is most effective. For example, a child with special education needs can only receive such education in the juvenile system; a child who has been through numerous prior rehabilitative programs with no success may have a previously undiagnosed mental disorder which, once identified, would be better treated in the juvenile system; or, a child with no or few prior offenses may present a strong case for giving him at least one chance in the juvenile justice system.

48 Geraghty & Rhee, *supra* note 1, at 620.

Understanding, and being able to convey to the court why there is "hope" for this particular child, is the challenge.

> The focus of this "theory of the case" must be to explain the behavior of the child as a product of understandable forces that, to some extent, are beyond the control of the child. Pursuant to their duty to represent the State zealously, prosecutors inevitably assert that children have acted intentionally and purposefully in transfer hearings. Defense counsel must understand and convey a more complex explanation of adolescent behavior.[49]

It is helpful to place the child in the context of normal adolescent development for the court. Refer to *Chapter 4: Understanding the Juvenile Client: An Overview of Adolescent Development* for research about adolescent cognitive, moral and identity development, and the impact of the family and environment on a child's growth. Making the court understand the child's behavior in the context of his developmental stage and the impact of traumatic life experiences and any disabilities will encourage a decision against transfer and in favor of treatment and rehabilitation for the child.

The recent United States Supreme Court case, *Roper v. Simmons,* which held that the death penalty for those whose crimes were committed while age 17 or younger is unconstitutional, also provides support and authority for argument against transfer to adult criminal court.[50] The *Roper* court found that there are three differences between adults and children under 18, which "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders."[51] These differences are:

> (1) Juveniles have a lack of maturity and an underdeveloped sense of responsibility more often than adults.
>
> (2) Juveniles are more vulnerable and susceptible to peer influence and outside pressure.
>
> (3) The character of a juvenile is not as well formed as that of an adult.[52]

The court also stated that "[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."[53] This logic should apply to transfer determinations as well. The fact that research has shown, and the Supreme Court of the United States has recognized, that children are not "irretrievably depraved" and are still developing a sense of self and morals suggests that all youth are still capable of benefiting from the rehabilitative services of the juvenile court system.

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49 *Id.* at 620-21.
50 *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183 (2005).
51 *Roper,* 125 S.Ct. at 1195.
52 *Id.* (citing Lawrence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Amer. Psychologist 1009, 1014 (2003)).
53 *Id.*

B. Preparation and Investigation

Preparation for the transfer hearing involves several time-consuming data collection and evaluation tasks. Gathering records, interviewing family and other key people in the child's life, working with at least one expert and investigating treatment alternatives are the critical areas of investigation and preparation. The following checklist, while by no means exhaustive, provides some suggestions for the kind of information that will be critical in preparing the case. Many of these preparatory steps have been discussed in other chapters in this manual in greater detail.

Meeting and developing a relationship with the client: This is crucial for developing a theory of the child for purposes of presenting a picture to the court of a child who is amenable to the rehabilitative options available in juvenile court.

Record collection: It is important to review records regarding the client's mental health history, education and family background. This information may enable the creation of picture for the court of how the child came to be the way she is today due to life experiences, disabilities or mental illness.

Key witness interviews (family, teachers, probation officer, detention staff): Explore witnesses who can speak to the client's receptivity to services and desire to make changes in her life. Those with experience with the child who can speak about positive qualities the child has can also be helpful in portraying the client as a child with many other qualities separate and apart from the delinquent behaviors alleged.

Expert evaluation and preparation: This may require filing a Motion for Funds for an Expert Witness, as discussed in *Chapter 13: Pre-Adjudication Motions and Hearings*. An expert can assist with preparing for the transfer hearing and can provide valuable testimony at the hearing itself. The expert can provide insight into the child's background, disabilities or mental illnesses, if any, and address issues of adolescent development and amenability to treatment and rehabilitation.

Investigating and developing a plan for treatment alternatives: It is crucial to investigate treatment options available within juvenile court jurisdiction and the community, and to develop a plan for how those resources can address the specific needs of the client. Developing a treatment plan similar to a detention release plan or post-disposition plan, as discussed in Chapter 9 and Chapter 16 of this manual, is key to convincing the judge that the resources are available to the child outside of criminal court jurisdiction. In fact, it is likely that more resources and services are available to the child in juvenile court and in the community than in adult secure care facilities. Being able to make a comparison between the available services for those charged as juveniles, versus those charged as adults, can be highly persuasive.

V. THE TRANSFER HEARING

The transfer statute requires a "full-blown" hearing[54] that "must measure up to the essentials of due process and fair treatment."[55] There are essentially two phases to the transfer hearing: the probable cause determination, which may have already been handled in the continued custody hearing, and the "amenability to rehabilitation" determination. The state bears the burden of proof on both determinations. Defense counsel must be prepared not only to rebut the state's evidence, but also to convince the judge that the child is worth rehabilitating.

A. Probable Cause Determination

In order for a motion to transfer a child to be granted, the burden is first on the State to prove that probable cause exists that the child committed the offense charged under Article 857.[56] That is, the state must first prove *every* element necessary to constitute the crime charged. In addition to proving the acts of each charged offense, the State must establish that the juvenile had the specific *mens rea* for the crime. All of the crimes listed under 857(A) are specific intent crimes; therefore, the state has to show that circumstances indicate that the youth "actively desired the prescribed criminal consequences to follow his act or failure to act."[57]

In most cases, probable cause will have been established at a prior continued custody hearing. However, if probable cause has not been established, the state carries this burden to the transfer hearing. If appropriate, counsel should consider challenging whether the State has adequately proven each of the requisite elements.[58] One strategy to consider if probable cause is really an issue is to postpone the probable cause determination to permit more time for investigation. When the evidence does not support a conviction of the crime charged, the Louisiana Supreme Court has generally remanded with instructions to discharge the defendant.[59]

54 *Bruno,* 388 So.2d at 787.

55 *Kent,* 383 U.S. at 562.

56 La. Child. Code Ann. art. 862(A)(1) (2006). *See In re Joshua,* 327 So.2d 429 (La. App. 4th Cir. 1976) (writs denied), 329 So.2d 450 (La. 1976) (entitled to challenge pretrial incarceration under standard of probable cause).

57 La. Rev. Stat. Ann. § 14:10(1) (2006).

58 For example, the state has to prove the value of a stolen item, the actual or constructive possession of a controlled dangerous substance on a drug charge, actual penetration for a rape charge, the existence of a gun for a battery or armed robbery charge, etc.

59 In *State v. Allien,* 366 So.2d 1308 (La. 1978), an adult defendant was charged with two counts of distribution of marijuana to minors. The State relied on hearsay as the exclusive evidence of defendant's guilt. The court held that unobjected to hearsay, which is the exclusive evidence of a defendant's guilt of the crime or an essential element, and where contradicted at trial by the sworn recantation of the out-of-court declarant, is no evidence at all. In another case, *State v. Legendre,* 362 So.2d 570 (La. 1978), an adult defendant was charged with the crime of battery with a dangerous weapon. He pled not guilty and filed a motion for bill of particulars asking the State to identify the dangerous weapon he allegedly used. The State replied, "Concrete on Parking Lot." The defendant filed a motion to quash, alleging conviction on this charge would not meet the requirements of aggravated battery. When the motion was denied, the Louisiana Supreme Court granted certirorari and held that "it will not do to base an indictment…upon an allegation of fact which cannot conceivably satisfy an essential element of the crime, and compel the accused to withstand the rigors of a jury trial with no expectation that a conviction can be supported by such an allegation."

B. "Clear and Convincing" Proof of "No Substantial Opportunity for Rehabilitation"

Louisiana Children's Code Article 862 places the burden on the state to affirmatively show "by clear and convincing proof" that there is no substantial opportunity for the child's rehabilitation through facilities available to the juvenile court.[60] The United States Supreme Court has held that when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money,' the intermediate standard of proof of clear and convincing evidence is appropriate.[61]

"Clear and convincing evidence" in general means that the fact of guilt must be proven to a greater degree than by "a mere preponderance of the evidence", the traditional measure of persuasion, but less than by "beyond a reasonable doubt," the stringent criminal standard.[62] To prove a matter by clear and convincing evidence means "to demonstrate that the existence of a disputed fact is highly probable, that is, much more probable than its nonexistence."[63]

In a transfer hearing, the stakes are significant: A young person stands to lose the protections and rehabilitative promise of the juvenile system, and face the harsher consequences of the adult criminal system. A recent case is illustrative of the State's duty under Article 862 of the Children's Code. In *State v. Collins,* the transferred juvenile was indicted for second-degree murder and had entered a plea to manslaughter when he subsequently appealed his conviction to contest the juvenile court's transfer order.[64] Requirements for transfer of a juvenile to district court were *not* met where the state proved only three of the six criteria in the juvenile court, where the transcript of the transfer hearing contained "only generalities and was glaringly void of detailed evidence about this defendant, specifics of his prior record of delinquency, his maturity and sophistication, and his physical or mental problems," and where the pre-sentence report "apparently containing details of his juvenile record" was prepared and submitted to the district court after transfer from the juvenile court.[65] Finding that the State failed to prove standards or criteria for transferring the juvenile to adult jurisdiction, the Second Circuit vacated the transfer order and all subsequent proceedings in district court and remanded the case to juvenile court for another transfer hearing.

C. Role of Defense Counsel in the Hearing: Showing Hope for Rehabilitation

While the State technically carries the burden of proof in the transfer hearing, defense counsel is ultimately responsible for conveying a compassionate portrayal of the child by weaving in his or her story and persuading the Court to give the child another chance. Rebutting the State's arguments regarding each of the six *Everfield*

60 La. Child. Code Ann. art. 862 (2006).
61 *See Santosky v. Kramer,* 455 U.S. 745 (1982).
62 *Sanders v. Sanders,* 62 So.2d 284 (La. 1952); *Succession of Bartie,* 472 So.2d 578 (La. 1985).
63 *In re Cole,* 92-2639 (La. App. 4th Cir. 04/28/93); 618 So.2d 554; *In re Connie H.,* 91-2212 (La. App. 1st Cir. 04/10/92); 599 So.2d 850.
64 *State v. Collins,* 29, 368 (La. App. 2d Cir. 05/07/97); 694 So.2d 624.
65 *Id.* at 625.

factors is essential. Rather than a piecemeal rebuttal, the most effective strategy for doing this may be using expert testimony to develop a full picture of who the child is and why he is amenable to treatment. Defense counsel should also be prepared to present a possible treatment plan so that the judge immediately recognizes there are viable alternatives to adult incarceration.

Following are some general guidelines to consider when advocating for a child in a transfer hearing:

- Always refer to the defendant as a "child" and describe the distinction between the goals of the adult and juvenile system.
- Argue that the child has not had sufficient opportunity to be rehabilitated.
- Argue that the child would likely be harmed in the adult system.
- Argue that the child would benefit from services in the juvenile system.
- Argue that the community would still be protected from the young person during treatment as a juvenile.
- Describe the child's potential and desire for change and the child's strong system of support.
- Argue that the child was not thinking as an adult at the time of the offense.
- Describe the child's moral development and remorsefulness.
- Describe the child's treatment needs.
- Describe successful juvenile interventions that were used for similar youth.

In many cases, counsel may want to avoid arguing against the seriousness of the offense and, in some situations, may even want to acknowledge the serious nature of the crime. If the facts are very bad, counsel may even want to stipulate to this factor for purposes of the transfer hearing and use the time to focus more in depth on the remaining considerations.

Counsel should prepare any witnesses expected to testify at the transfer hearing. Except in rare circumstances, the child should not testify, not only because children are seldom their strongest advocates, but also because their testimony may be used to impeach them in future proceedings.[66]

66 La. Child. Code Ann. art. 862(C)(2) (2006).

D. Guidelines for the Juvenile Court & Required Findings

The juvenile court judge making a transfer determination must provide stated reasons for the transfer on the record.[67]

> Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of reasons motivating the [transfer] including, of course, a statement of the relevant facts. It may not "assume" that there are adequate reasons, nor may it merely assume that "full investigation" has been made.[68]

While the transfer hearing must reflect a consideration of the guidelines as codified in Article 862, the *Everfield* court expressly stated that its suggested guidelines were not meant to limit any other relevant considerations that may exist. The ultimate decision and discretion is left to the juvenile court judge who has the opportunity to hear the evidence and to observe the juvenile. However, the exercise of that discretion must be "principled and must reflect the policy in favor of non-criminal treatment" of children under 17 years of age.[69]

Because the stakes are so high in transfer proceedings, *Everfield* interpreted the transfer statute as sanctioning transfer "of only those youth for whom there is no hope of treatment or rehabilitation in the types of facilities utilized by juvenile courts." Therefore, the juvenile court judge must explore every reasonable option to assure a reviewing court that the juvenile cannot be treated or rehabilitated through available facilities, and these considerations must appear in the record.[70] In fact, the juvenile court must not only review each of the six *Everfield* factors, but must provide stated reasons on the record that reflect adequate review.[71]

VI. SEEKING A WRIT ON A TRANSFER DECISION

As discussed at the outset of the chapter, the decision to transfer a child can mean the difference between an institutionalized existence or the opportunity for a meaningful life for that child. Therefore, an appeal should always be filed when a decision is made to transfer a child to criminal court jurisdiction, except in rare circumstances when appellate review is not in the interest of the client. The decision to transfer is an interlocutory judgment which either the child or the State, or both, have the right

67 La. Child. Code Ann. art. 862(B) (2006).
68 *Kent*, 383 U.S. at 561.
69 *Everfield*, 342 So.2d at 656.
70 *Id.* at 656-57 (court remanded the transfer due to an absence of careful review on the record); *In re Smith*, 359 So.2d 1271 (La. 1978) (remanded to juvenile court due to deficient transfer determination where judge had not found reasonable grounds to believe that the child is not amenable to treatment or rehabilitation); *State v. Collins*, 29, 368 (La. App. 2d Cir. 05/07/97); 694 So.2d 624 (requirements for transfer not met where transcript of proceedings contained only generalities and was void of detail about the juvenile).
71 *State v. Blouin*, 352 So.2d 1283 (La. 1977) (case remanded to juvenile court, where the record reflected an absence of both consideration of the required factors and of stated reasons for the transfer).

to have reviewed summarily by the appropriate court of appeal.[72] Review of a determination to transfer a juvenile to criminal court under Article 857 is properly challenged by a writ under the general supervisory jurisdiction of the Louisiana appellate courts.[73] While Articles 330 and 331 of the Children's Code generally grant the right of appeal from "any final judgment," the "better procedure to gain review of a juvenile transfer order obviously is the Art. 863 procedure simply because that procedure contemplates review before any proceedings are undertaken in the district court if the transfer is ordered."[74]

In order to preserve the transfer issue for review, counsel must file a Notice of Intent to Seek Writ and Return Date or orally advise the court of her intent to seek supervisory writ and request a return date.[75] The Children's Code entitles counsel to have a copy of the transcript which counsel should request immediately.[76] Counsel may also want to file a Motion to Stay Proceedings Pending Writ, since the writ does not, in and of itself, suspend the judgment and transfer of the child to adult jail. Even though the Code permits the youth to be transferred to an adult jail after the entry of judgment for transfer, counsel should still include a request to have the youth remain in the juvenile detention center pending determination of the writ.

VII. CONCLUSION

Given the gravity of the transfer of a child to adult criminal court jurisdiction, a transfer proceeding can be the most important stage of a child's delinquency case. Aggressive and zealous advocacy to ensure that a child facing transfer is remanded to juvenile court, where he will have the opportunity for rehabilitative services and a chance to change his life, is a fundamental responsibility of juvenile defenders.

72 La. Child. Code Ann. art. 863 (2006).
73 *Everfield*, 342 So.2d at 657 (citing La. Const. art. V § 5(A) (1974)).
74 *Collins*, 694 So.2d at 625.
75 *See infra* Chapter 20: Appeals and Extraordinary Writs.
76 La. Child. Code Ann. art. 862(C)(2) (2006).

CHAPTER 15
ADJUDICATION

The adjudication hearing in a delinquency case is the equivalent of trial in criminal court, and an adjudication in juvenile court is the equivalent of a conviction in criminal court. Adjudications in delinquency cases are done through bench trials, where the judge ultimately determines whether the child committed the alleged delinquent act and is, therefore, a delinquent child. Children do not have the right to jury trials in juvenile court.[1]

Because of the special nature of juvenile court, adjudications on delinquency matters must be held expeditiously—within 30 days of the appearance to answer the petition if the child is held over in continued custody, and within 90 days if the child is not held in custody.[2] If the adjudication is not timely held, the charges should be dismissed and the child should be released from custody.[3] However, the court may, for good cause, extend the time period for holding the adjudication.[4]

I. PLEAS AND NEGOTIATIONS

In some cases, after thoroughly investigating the case, completing legal research on the elements of the alleged delinquent act and all possible defenses, and analyzing the evidence of the prosecution and defense, it may become apparent that there is little chance for success at adjudication. In such cases, it may be worthwhile to discuss with the client the possibility of a plea of guilty, known as an "admission" in delinquency cases. Pleas in juvenile court are often overutilized, due to overwhelming caseloads and the more informal nature of juvenile proceedings. Therefore, it is crucial that all of the preparatory steps discussed in the previous chapters are completed and that the case is fully analyzed before recommending an admission to the young client.

A. Assessing the Benefits of a Plea

Deciding whether or not to plead guilty, or make an admission, is ultimately the client's. Yet counsel must weigh the benefits of a plea and advise the client accordingly, making him aware of counsel's professional opinion regarding what is best, given the specific circumstances of the case. Some factors that should be considered in determining whether an admission would be beneficial in a particular case are:

1 La. Child. Code Ann. art. 882 (2006); *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971); *State in the Interest of D.J.*, 2001-2149 (La. 05/14/02), 817 So.2d 26.
2 La. Child. Code Ann. art. 877(A)-(B) (2006).
3 La. Child. Code Ann. art. 877(C) (2006).
4 La. Child. Code Ann. art. 877(D) (2006).

1) The likelihood of winning at trial—weighing the strength of the prosecution's case versus the strength of the defense's case;

2) The chances the judge, in the event of an adjudication of delinquency, would punish the child at disposition for going to trial and "wasting the court's time" by proceeding with a hearing when the evidence clearly suggests that the child committed the alleged delinquent act; and

3) The advantages that could be gained from a guilty plea, such as a reduced charge or a recommendation for a lenient disposition from the prosecution.[5]

Another factor to consider in cases involving particularly egregious facts, such as a violent crime or a crime involving an assault on a very young child, is the degree to which the judge would be influenced by the facts of the case or by the identity of the complainant.[6] In some situations, a delinquency finding may result in other consequences for the client, such as exposing an immigrant client to deportation proceedings or, in the case of certain sex crimes, exposing the client to sexual predator registration. Counsel should consider these factors as well and advise the client accordingly.

B. Plea Offers from the Prosecution

The prosecutor in the case may approach counsel to offer a plea agreement. Counsel must then discuss with the client any plea offers that have been presented. The prosecutor may agree to amend the petition to a lesser charge or to recommend a particular disposition to the judge in return for the child's admission to the allegations. Again, careful analysis of the case should be completed prior to advising the client about accepting or rejecting the prosecutor's offer. Counsel also should consider the prosecution's possible motivations for making the plea offer. For instance, the prosecution's case may be relatively weak. Or they may have lost contact with a key witness. Hence, counsel should explore the State's motivation for the offer before advising the client on whether to accept it or not. The motivation for the State to offer such an agreement may actually mean that the client's chances for success at adjudication are quite high. Moreover, when advising the client regarding acceptance of a plea offer, it is important that the client understands the great discretion that juvenile court judges have in issuing dispositions and that the judge is not required to follow even a lenient recommendation by the district attorney.

5 Randy Hertz, Martin Guggenheim & Anthony Amsterdam, Trial Manual for Defense Attorneys in Juvenile Court 347 (1991).
6 *Id.* at 368.

C. Your Client Expresses an Interest in Making an Admission

In some cases, the client will advise counsel that she wants to plea, or admit to the allegations against her. If the client indicates an interest in making an admission, consider the following possible motivating factors and thoroughly explore the reasons for the client's position:

> 1) Is the client afraid of going to adjudication because she is worried that she will annoy the judge if she exercises that right?
>
> 2) Does the client believe the judge will look more favorably on her if she pleads?
>
> 3) Is someone pressuring the client to plead guilty?...
>
> 4) Has counsel influenced the client's decision to plead guilty in any way? If so, how?
>
> 5) Does the client understand that she has the right to go to [trial]?...
>
> 6) Does the client understand the other rights she is giving up by pleading guilty?[7]

Counsel should negotiate and formalize a plea agreement with the prosecutor only if the client fully understands her rights and reasonably decides to make an admission.[8] Negotiating a plea agreement presents another opportunity to be creative. Counsel should consider the interests and concerns of the prosecutor and craft an agreement to address those concerns. For instance, the client may agree to stay away from the victim, co-defendants or a certain part of town. Probation could include drug treatment, counseling or other services that the client needs. But note that counsel ought to discuss the proposals with the client before presenting them to the district attorney.

D. Preparing Your Client to Enter an Admission in Court

After counsel has fully evaluated the advantages and disadvantages of a plea agreement and has advised the client accordingly, the client may still opt to make an admission to the charges. If so, counsel will need to prepare the client carefully for the court hearing at which he will officially make the admission. Counsel should inform the client about the plea process and the questioning that he can expect from the judge. The client should be familiar with the plea colloquy that the judge is required to make under *Boykin v. Alabama*[9] and the range of possible punishments that the judge may impose once the admission is made.[10]

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7 National Juvenile Defender Center, Juvenile Defender Delinquency Notebook: Advocacy and Training Guide 181-82 (2d ed. 2006), *available at* www.njdc.info/pdf/delinquency_notebook.pdf [hereinafter "NJDC Delinquency Notebook"].

8 *Id.* at 178.

9 395 U.S. 238, 242-43 (1969) (holding that the judge should ask the defendant questions pertinent to his guilty plea, commonly referred to as being *Boykinized*).

10 NJDC Delinquency Notebook, *supra* note 7, at 235-36.

When preparing the client for the entering of an admission, the counsel should review the following questions that the judge may ask in court:

- What is your name?
- How old are you?
- What grade are you in in school?
- Do you understand the charges against you? (State the charges as alleged in the petition.)
- Have you received a copy of this petition?
- Have you read it?
- Have you discussed it with your attorney?
- Do you understand that you have the right not to plead guilty and to continue asserting your innocence?
- Do you understand that you have a right to go to trial?
- Do you understand that you are presumed innocent until proven guilty?
- Do you understand that the prosecution must produce witnesses against you in court and that you have the right to confront and cross-examine these witnesses?
- Do you understand that you have the right to subpoena witnesses to testify on your behalf in court?
- Do you understand that you have the right to remain silent and are not required to testify?
- Are you pleading guilty because of an agreement between you and the prosecutor?
- Do you understand that the judge can refuse to accept this agreement and impose any sentence that she thinks is appropriate, including confinement?
- Except for the agreement between your attorney and the prosecutor, has any other person made any promises or threats to you or to any of your family or friends in order to force you to plead guilty?
- Are you pleading guilty, freely and voluntarily, because you committed the acts charged in the petition?
- Explain in your own words what happened and why you think you are guilty.[11]

11 *Id.* at 184-87.

The client should understand each of the above questions, and counsel should answer any of the client's questions prior to the court hearing at which he makes his admission.[12] Also, counsel should make sure that the client is prepared to present himself appropriately before the court and that he is prepared to exhibit remorse for the acts to which he is admitting.

II. CONFIDENTIALITY AND SEQUESTRATION OF WITNESSES

A. Confidentiality of Juvenile Court Proceedings

In general, juvenile proceedings are confidential and closed to the public. The only persons who may be present for the adjudication or other hearings involving a delinquency matter are "the child, his parents, counsel, the district attorney, authorized officials of the court, and witnesses called by the parties."[13] However, the requirement of confidentiality of juvenile court proceedings does not apply when the child is alleged to have committed a crime of violence as defined in title 14, section 2(13) of the Louisiana Revised Statutes.[14] Adjudication hearings involving allegations of violent crimes are open to the public.[15]

B. Sequestration of Witnesses

Although witnesses called by the parties are allowed to be in the courtroom during delinquency proceedings, it is often preferable to have witnesses sequestered so that they will not be persuaded by arguments of the attorneys or by statements of other witnesses and the judge. The court may sequester witnesses on its own motion; however, the court must sequester witnesses upon request by one of the parties.[16] Sequestration excludes the witnesses from the courtroom or any other place where they can see or hear the proceedings and prohibits them from discussing the facts of the case with anyone except counsel in the case.[17] A witness can be exempted from this order in the interest of justice.[18]

12 In some instances, the client may agree to make an admission despite maintaining his innocence, given his low probability of success at trial and/or the prospect of receiving a harsher disposition. Such a client may feel understandably uncomfortable with admitting guilt outright. Under such circumstances, the client may be permitted to enter a guilty plea solely because it is in his best interest to do so, provided that the record suggests a clear factual basis for the plea. *North Carolina v. Alford,* 400 U.S. 25 (1970). In *Alford,* the United States Supreme Court held that "the Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence." Moreover, under *State v. Crosby,* 338 So.2d 584 (La. 1976), a client may make an admission conditioned upon appellate review of an alleged trial court error. Under *Crosby,* the plea will be invalidated if the appellate court finds in favor of the defendant. Otherwise, the plea will remain valid.

13 La. Child. Code Ann. art. 879(A) (2006).

14 La. Child. Code Ann. art. 879(B) (2006).

15 *Id.*

16 La. Child. Code Ann. art. 879(C) (2006).

17 *Id.*

18 *Id.*

III. RULES OF EVIDENCE

Adjudication hearings are subject to the rules of evidence set forth in the Louisiana Code of Evidence as applicable to criminal cases.[19] A child alleged to be delinquent cannot be compelled "to testify [at adjudication], and evidence obtained in violation of the child's rights under the Constitution of the United States or the Constitution of Louisiana shall not be admitted over objection."[20]

Counsel should be familiar with the rules of evidence prior to the adjudication, paying close attention to the statements and the form of questions of the district attorney, as well as to the statements of the witnesses during the adjudication. Defense counsel should object to all inappropriate questions and statements that may prejudice the client. While counsel may, of course, object to any statement or question that violates the rules of evidence, objections should be confined to such issues that actually affect the outcome of the case. For instance, a leading question from the district attorney regarding the witness's place of employment may not be prejudicial to the client. However, a leading question regarding either the identification of the client or the witness's observations of the incident at issue, for example, will be highly prejudicial, and an objection must be lodged.

Following is a list of some of the more common evidentiary objections that may be made during the adjudication:

1) **Leading Question:** Leading questions should not be used on direct examination of a witness, except when needed to develop testimony, to examine an expert witness's opinions and inferences, or to examine a hostile witness or adverse party.[21]

2) **Irrelevant:** "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[22] Any evidence that is irrelevant is not admissible.[23]

3) **Prejudicial Effect Outweighs the Probative Value:** Even relevant evidence may be excluded from the record if the "probative value is substantially outweighed by the danger of unfair prejudice."[24]

4) **Improper Foundation:** An improper foundation objection may be made whenever a witness attempts to testify to a matter of which the

19 La. Child. Code Ann. art. 881(A) (2006).
20 La. Child. Code Ann. art. 881(B) (2006).
21 La. Code. Evid. Ann. art. 611(C) (2006).
22 La. Code. Evid. Ann. art. 401 (2006).
23 La. Code. Evid. Ann. art. 402 (2006).
24 La. Code. Evid. Ann. art. 403 (2006).

witness has no personal knowledge or to a document for which no foundation has been laid.[25]

5) **Hearsay:** "'Hearsay' is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted."[26] Hearsay evidence is not admissible unless an exception to the hearsay rule applies.[27]

6) **Lack of Personal Knowledge of the Witness:** A witness cannot testify to matters of which the witness does not have personal knowledge.[28]

7) **Character Evidence Offered to Prove Criminal Conduct:** While character evidence of an accused can be offered for certain specified purposes, it cannot be offered to prove that the accused acted in conformity with a character trait on a particular occasion.[29]

8) **Evidence Was not Tendered to Defense:** If the district attorney presents witnesses or any other evidence at the adjudication of which counsel was not advised in the State's response to discovery requests, presentation of such evidence should be objected to as a violation of discovery rules and, in some instances, the *Brady* doctrine.[30]

IV. PRESENTATION OF EVIDENCE—GETTING IT IN THE RECORD

The Children's Code provides that the normal order of an adjudication shall be:

1) Presentation of evidence for the State;

2) Presentation of evidence for the child;

3) Presentation of evidence to rebut evidence for the child;

4) Closing arguments.[31]

The order of the adjudication hearing may be rearranged with the consent of counsel.[32] The court may also allow the State and counsel for the child to make opening statements.[33]

At an adjudication hearing, the child has the right to "introduce evidence, call witnesses, be heard on his own behalf, and cross-examine witnesses called by the

25 *See* La. Code. Evid. Ann. art. 602 (2006).
26 La. Code. Evid. Ann. art. 801(C) (2006).
27 La. Code. Evid. Ann. art. 802 (2006).
28 La. Code. Evid. Ann. art. 602 (2006).
29 La. Code. Evid. Ann. art. 404(A) (2006).
30 *Brady v. Maryland,* 373 U.S. 83 (1963).
31 La. Child. Code Ann. art. 878(A) (2006).
32 La. Child. Code Ann. art. 878(B) (2006).
33 La. Child. Code Ann. art. 878(C) (2006).

State."[34] If the child has contested the adjudication on the basis of insanity, the members of the sanity commission (i.e., the individuals charged with determining whether or not the child suffers from a mental disease or defect) may be called as witnesses by the court, district attorney or the child and are subject to cross examination by any party, regardless of who called them as witnesses.[35] Other evidence regarding sanity may be introduced by the child or the district attorney at the adjudication.[36]

A. Opening Statement

Although not routine in juvenile delinquency cases, making an opening statement can allow counsel to present the case from the start in a light most favorable to the client, as well as provide an opportunity to focus the judge on certain relevant or favorable issues. Counsel should request the opportunity to present such a statement before the State begins to present its case. While the court is not obligated to provide such an opportunity, most judges will agree if counsel assures the court that the statement will be brief. The opening statement should be used wisely to identify some of the key issues involved in the case, particularly those most helpful to the client, and to provide an overview of the client's theory of the case.

B. Presentation of Witnesses

By the date of the adjudication, counsel should have met with and prepared all of the witnesses who may be called. Counsel should know what each witness will say and should feel confident that the witnesses will be able to handle cross-examination by the State and potential questioning by the judge. The order in which witnesses will be called should be carefully considered and determined in advance. Witnesses should be presented in a logical order, making sure to present those who lay the foundation for the statements of other witnesses first. Counsel also should present witnesses in an order which will maximize the impact of the most compelling testimony supporting the client's defense.

C. Cross-Examination

Counsel should be ready to cross-examine the State's witnesses with questions and impeachment documents prepared in advance. Ideally, counsel or an investigator will have met with each of the State's witnesses in advance of the adjudication and should have a sense of their testimony. Cross-examination questions prepared in advance should be leading in nature. Counsel should not ask open-ended questions of the State's witnesses at the adjudication or questions to which counsel does not already know the answers.

If the witness signed any statements or affidavits, or if there is a transcript of the witness's testimony from a previous hearing, those statements or transcripts should be

34 La. Child. Code Ann. art. 880(A) (2006).
35 La. Child. Code Ann. art. 880(B) (2006).
36 La. Child. Code Ann. art. 880(C) (2006).

accessible during cross-examination of that witness. Counsel should highlight the portions of the previous statements or testimony that are relevant to the cross-examination, and extra copies should be available to present to the witness, the court and the prosecution, in the event that the witness needs to be impeached with respect to her prior inconsistent statements.

If the witness is hostile, counsel should not get flustered or change the plan for cross-examination, but should continue to press the witness for answers to the questions. In some situations, it may be necessary to request that the judge direct the witness to answer the questions. If a particular witness is known to be hostile beforehand, counsel may want to prioritize the questions in advance and focus on those issues that are most important to elicit from the witness.

D. Closing Argument

While many practicing in juvenile court take advantage of the lack of formality of the proceedings by waiving closing arguments, counsel should prepare for at least a brief closing statement once all evidence has been presented. In the closing statement, counsel should remind the judge of the prosecutor's burden of proof, review favorable evidence and restate the theme of the case one final time. Since the closing argument is made to a judge, there is no need to review the law and evidence as if in front of a jury. The judge should know the law and should have paid attention to the evidence presented. Most judges will also appreciate a concise closing statement.

V. ADJUDICATION ORDER

The court should usually decide if the evidence supports an adjudication that the child is delinquent immediately after the adjudication hearing, but in some exceptional cases, the court may take the matter under advisement.[37]

A. Finding of Delinquency

The court should issue a finding of delinquency only if the State has proven beyond a reasonable doubt that the child committed the delinquent act alleged in the petition.[38] If the court finds the child to be delinquent, it should hold a dispositional hearing to determine the consequences, if any, for the child. The hearing may be held immediately following the adjudication, but must be held within 30 days of the judgment of adjudication, unless the court extends such time for good cause.[39] As an advocate for the child, counsel should present an extensive case at the disposition hearing.[40] In order to have the opportunity to fully prepare and focus the court specifically on the issues of an appropriate disposition, counsel should request a separate

37 La. Child. Code Ann. art. 884(A) (2006).
38 La. Child. Code Ann. art. 883 (2006).
39 La. Child. Code Ann. art. 892 (2006).
40 *See* Chapter 16, *infra*, for a discussion of the preparation and advocacy necessary for such a hearing.

hearing date for the disposition, unless it is clear that the judge already has decided to issue an appropriate disposition.

If the child is adjudicated delinquent, the court must also determine whether the child should be held in custody pending the disposition hearing.[41] If the child is adjudicated delinquent of a misdemeanor-grade delinquent act, the child shall have the right to bail.[42] If, however, the adjudication is based on a felony-grade delinquent act, the child shall have a presumptive right to bail unless the court is convinced by competent evidence that releasing the child will pose a danger to other people or the community.[43] Upon a finding of delinquency, the court must also advise the child of the two-year limit on seeking post-conviction relief, as mandated by Article 930.8 of the Louisiana Code of Criminal Procedure.[44]

B. Families in Need of Services ("FINS") Adjudication

The evidence presented at adjudication may suggest that the child and his family are in need of services. In that case, the court may rule accordingly and issue a disposition under Chapters 10 and 12 of Title VII of the Children's Code.[45]

C. Dismissal of the Petition

The court should dismiss the petition if it determines that the evidence does not warrant an adjudication of either delinquency or FINS.[46]

VI. POST-ADJUDICATION MOTIONS—VACATING ADJUDICATION ORDER

A. Motion to Vacate the Adjudication

After a finding of delinquency by the court, a child may file a Motion to Vacate the Adjudication at any time before the disposition.[47] A delinquency adjudication shall be vacated and the case dismissed if the court finds one of the following:

> 1) The petition is substantially defective, in that an essential averment is omitted;
>
> 2) The delinquent act charged in the petition is not based upon an offense which is punishable under a valid statute;
>
> 3) The court making the adjudication lacked jurisdiction;
>
> 4) The act charged constitutes double jeopardy; and/or

41 La. Child. Code Ann. art. 886(A) (2006).
42 La. Child. Code Ann. art. 886(B) (2006).
43 La. Child. Code Ann. art. 886(C) (2006).
44 La. Code Crim. Proc. Ann. art. 930.8 (2006); *In re T.S.*, 04-1111, p.8 (La. App. 5th Cir. 03/01/05); 900 So.2d 77, 82; *In re J.F.*, 03-0321, p.8 (La. App. 3d Cir. 08/06/03); 851 So.2d 1282, 1287.
45 La. Child. Code Ann. art. 884(B) (2006).
46 La. Child. Code Ann. art. 884(C) (2006).
47 La. Child. Code Ann. art. 887(A) (2006).

5) The prosecution was not timely instituted.[48]

An adjudication shall be vacated and a new adjudication hearing ordered, upon motion of the child and after a contradictory hearing, if the court finds one of the following:

1) The adjudication is not responsive to the petition, or is otherwise so defective that it will not form the basis for a valid judgment;

2) The adjudication was obtained by fraud or mistake sufficient to justify vacating the adjudication;

3) The child [satisfies] the requirements of Articles 851(3), 853, and 854 of the Code of Criminal Procedure regarding the discovery of new and material evidence;[49] and/or

4) The adjudication judgment is contrary to the law and evidence.[50]

The court can also vacate the adjudication if "the ends of justice" would be served by doing so.[51]

B. Motion for a New Adjudication Hearing

A motion for a new trial must be filed within three days of the mailing of the notice of judgment and must be decided within seven days from the date of submission.[52]

VII. PRESERVING THE RIGHT TO APPEAL

In an adjudication hearing, it is important that counsel considers the potential need for an appeal if the outcome of the case is not favorable to the client. Counsel should be considering this possibility and preserving the client's right to appeal throughout the adjudication. In order to preserve the client's right to challenge all appealable issues, counsel must object timely to all procedural violations during the adjudication, to evidence which is presented in violation of the client's procedural or substantive rights, and to any misconduct by the prosecutor or judge. Counsel must also move to dismiss the delinquency petition at the end of the State's case and at the end of all evidence, but before closing statements.

48 *Id.*
49 Article 851(3) of the Code of Criminal Procedure provides that a new trial shall be granted whenever "[n]ew and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty." La. Code Crim. Proc. Ann. art. 851(3) (2006). Articles 853 and 854 provide procedural guidance in filing a motion for a new trial when 851(3) applies. La. Code Crim. Proc. Ann. arts. 853–854 (2006).
50 La. Child. Code Ann. art. 887(B) (2006).
51 La. Child. Code Ann. art. 887(C) (2006).
52 La. Child. Code Ann. art. 332(C) (2006).

CHAPTER 16
DISPOSITION

Once a child has been adjudicated delinquent, the disposition hearing, comparable to a sentencing hearing in criminal court, becomes crucial. The dispositional hearing will determine whether the child will be removed from his home and placed in a secure facility or given a chance to receive needed services in his community. Preparation for the disposition should have commenced immediately upon involvement in the case, and the hearing itself can be as extensive as the adjudication hearing.

It is important to consider all possible options at this stage of the delinquency proceedings. The primary goal as an advocate under these circumstances should be to present a picture of the client as a child who can be treated in his community. Counsel has the opportunity to be creative in presenting a dispositional proposal to the court which is appropriate for the client and his needs, but which also tempers any concerns the court may have about allowing the client to remain in the community. This chapter will discuss the disposition process, preparation for a disposition hearing, and presentation of the case and an alternate dispositional plan at the hearing.

I. PRE-DISPOSITION PREPARATION

A. Securing Additional Documentation

Although the investigative plan should have included gathering information relevant to the adjudication and the disposition, additional documents which had not been obtained at the time of the adjudication may be needed for the dispositional hearing. One example is documents from the detention center regarding the behavior of the client in detention, if she has been held pending adjudication and disposition. This information may assist an argument that the client is not in need of secure care, or may warn of evidence that the district attorney could use in advocating for secure care, depending on the client's behavior while in detention. Counsel also will want to obtain a copy of any predisposition investigation conducted by the probation department of the Office of Youth Development ("OYD"). Counsel should obtain OYD screening and recommendation policies from the local probation office or OYD headquarters in Baton Rouge, La., to assist in evaluations of the predisposition investigation and recommendations made by the probation officer. Other documents that counsel learns of at or after the adjudication may be beneficial at the dispositional stage.

B. Pre-Disposition Investigation and Evaluations

In preparation for the disposition hearing, the court can order physical and mental examinations and evaluations of the child, which may assist the court in making a decision regarding an appropriate disposition.[1] The court also may order the preparation of a psychosocial summary and case history about the child, which can include confidential information from the court records, for use by the evaluators.[2] Copies of any reports tendered to the court by the evaluators shall be made available to the district attorney and counsel for the child.[3]

In addition, the court may order the probation officer to prepare a pre-disposition report, also called a pre-disposition investigation ("PDI"), to assist it in making its disposition determination. The report of the probation officer shall include information regarding the following:

> 1) The circumstances attending the commission of the offense; the attitudes of the child and his parents toward the offense; the prior offenses committed by the child, including other referrals or contacts not resulting in juvenile court petitions; and, when applicable, the disposition of companion cases arising out of this offense.
>
> 2) The impact on the victim, if a child is adjudicated of or admits to a delinquent act involving a victim; a victim impact statement, which the district attorney may file with the court, that includes factual information as to whether the victim or his family has suffered, as a result of the offense, any monetary loss, medical expense or physical impairment.
>
> 3) The child's home environment, including his family's composition and dynamics, stability, economic status, participation in community or religious activities, and any physical, mental or emotional disabilities, substance abuse or criminal history of any of its members.
>
> 4) The child's current physical description, developmental and medical history, social adjustment in the community, school record, employment or vocational interests, significant behavior patterns or other personality traits relevant to his rehabilitation.
>
> 5) A list of all persons contacted in completing the investigation and their relationship to the child.
>
> 6) A brief statement of the child's identified behavioral problems and the probation officer's assessment of cause and potential for rehabilitation, indicating specifically those resources available in the community or within the child's extended family which could provide needed assistance to the child and his family.

1 La. Child. Code Ann. art. 888(A) (2006).
2 La. Child. Code Ann. art. 888(B) (2006).
3 La. Child. Code Ann. art. 889 (2006).

7). Recommendations for suggested disposition, including, if applicable, special conditions of supervision.[4]

Copies of the pre-disposition report must be made available to the district attorney and counsel for the child at least three days prior to the disposition hearing, unless such time is extended by the court for good cause.[5]

If the child was adjudicated delinquent for committing an act involving the distribution of or possession with intent to distribute a controlled dangerous substance, and the child is in grades nine through 12, the court must order the disclosure of the pre-disposition report to the principle of the school where the child is registered or enrolled.[6] However, only those portions of the report which contain information regarding the instant arrest, conviction, adjudication, or disposition can be disclosed to the school.[7]

C. Securing and Preparing Witnesses for the Disposition Hearing

One goal for the disposition hearing should be to show the court the child behind the conduct. Keeping this goal in mind will help in determining which witnesses to subpoena for the hearing. Counsel should subpoena witnesses such as family members, teachers, friends, ministers, potential mentors and anyone else who can speak positively about the child, demonstrating through these witnesses that the client has support in the community. In lieu of having some of these people testify, counsel also may want to consider having them write letters regarding the child's positive attitude and their willingness to provide support to and work with the child upon his return to the community. Any witnesses should be carefully prepared for the hearing and for potential cross-examination questions from the State, which may include questions regarding whether the witnesses are familiar with the specifics of the crime. Before being subjected to cross-examination, witnesses should be familiar with the client, his background, the delinquent act and, in light of all this information, still be interested in supporting the child.

Counsel should also consider whether it would be beneficial to the disposition determination to have the client testify. The child's testimony may be beneficial if the client would like to speak about his remorse for the crime committed or talk about what he intends to do to change his behaviors in the future. If the client will be a witness, counsel will have to take the time to carefully prepare him. Counsel should guide the client's development of a statement to the court so that it will be helpful and convincing. Statements by the client which suggest that he does not take responsibility for or feel bad about what he has done may only hurt him and cause the judge to consider a harsher disposition. If the client is unable to be articulate or to focus on issues that will actually be convincing to the court, the client may write a letter to

4 La. Child. Code Ann. art. 890 (2006).
5 La. Child. Code Ann. art. 891(A) (2006).
6 La. Child. Code Ann. art. 891(D) (2006).
7 *Id.*

the judge instead. Counsel can assist the client in writing the letter by, for example, reading it and providing feedback on ways to make the letter more helpful to the disposition process. The advantage of writing a letter, as opposed to testifying on the witness stand, is that the client will not become nervous and say something harmful at the last minute, nor will he be subjected to cross-examination by the district attorney or questioning by the judge.

D. Negotiating with the Prosecutor and the Office of Youth Development

In preparation for the disposition hearing, it may be helpful to engage in some conversations and negotiations with the prosecutor and OYD. Counsel should talk with the prosecutor in advance of the disposition hearing to find out what his stance is on the type of disposition that should be ordered in the case. Counsel can use advocacy skills to educate the district attorney about the positive attributes of the client, her family, and her community, and to suggest alternative dispositional options. Counsel can utilize the arguments that providing community-based services are better for both the client and the community. For instance, counsel may point out that research indicates that community-based placements, as a part of a graduated sanctions program, are less costly and more effective at reducing recidivism rates among youth in the delinquency system.[8] Drawing on such research can take advantage of the prosecutor's focus on community safety to convince him that community-based services are more likely to rehabilitate the child and protect the community.

E. Counseling Client and Family Regarding Disposition Alternatives

In preparation for the disposition hearing, it is important to talk with the client and his family about the range of possible dispositions and to work with them to craft a plan for the least restrictive disposition. Counsel should talk with the client and his family about testifying at the hearing and about what the judge will want to hear, most notably: that the child feels remorse and wants to change, and that the parents will take the charges seriously, do a better job of supervising the child, enforce more rules in the house and comply with the orders of the court.

F. Preparation of an Alternative Dispositional Plan

In preparation for the disposition hearing, counsel should think about an appropriate disposition for the client given her history, her needs and the circumstances of the delinquent act for which she was adjudicated. Preparation for the disposition hearing should involve more than objecting to the State's request for secure care. Counsel should prepare to present a disposition plan which is well-developed and suits the needs of the client. The plan should provide for sufficient supervision and for any special needs of the child. Creativity and working closely with the client and her family will help in developing a plan that is realistic and appropriate for the child. If there already exists an alternative to detention plan, as discussed in Chapter 9 of

8 Office of Juvenile Justice & Delinquency Prevention, U.S. Department of Justice, Guide for Implementing the Comprehensive Strategy for Serious, Violent, and Chronic Juvenile Offenders 133-36 (1995), *available at* www.ncjrs.gov/pdffiles/guide.pdf.

this manual, the same recommendations may apply to the development of a dispositional plan. In fact, the client's successful compliance with the terms of the alternative to detention plan is a compelling argument in favor of utilizing the same plan for the disposition.

Developing a dispositional plan will require familiarity with community-based services. It also may require the assistance of a mental health expert who can help determine the needs of the client and identify programs which can provide for those needs. This mental health expert then can be utilized as a witness at the disposition hearing, testifying to the needs of the client and the available resources and structures that can be put in place in the child's home and community to satisfy those needs. If counsel does not have access to a mental health expert and needs one to assist with the development of the plan or to testify regarding the plan at the hearing, it may be necessary to file a motion requesting funds to hire an expert for assistance with the disposition process.

The dispositional plan, developed with the assistance of experts, the client and the family, should be comprehensive and realistic. The dispositional plan should be set forth in writing and presented to the court at the disposition hearing. Counsel should think broadly and creatively in the development of the plan and consider factors that may be compelling for the judge presiding over the case.

Some alternatives to secure care, which can be incorporated into a dispositional plan, include the following:

- A set daily schedule with fixed locations and times;
- Attendance at treatment, counseling sessions, or school programs;
- A curfew;
- Informal daily reporting or checking in with a probation officer or other appropriate person;
- Restrictions regarding contacts with particular people, such as co-defendants, the victim or others involved in the criminal or delinquency system;
- Required presence of an adult at all times;
- Electronic monitoring;
- Placement with a more responsible family friend or relative when there are concerns about the home environment;
- Placement in a foster home;
- Placement in a non-secure treatment facility, group home or shelter;

- Placement in an existing day treatment program.[9]

This list is not meant to be exhaustive. Counsel should use the above alternatives as a starting point and work with mental health experts, the child and his family to create a dispositional plan that will be compelling to the court.

G. Deferred Dispositional Agreement

After a finding of delinquency and upon motion by the district attorney or the child, the court may suspend further proceedings and place the child on supervised or unsupervised probation, with or without conditions, through a deferred dispositional agreement.[10] The child and his parent must consent to the disposition.[11] The agreement shall remain in force for six months unless the child is released from supervision earlier by the court.[12] The district attorney or supervising agency can also request an extension of the supervision period prior to its expiration, for up to an additional six months or for such time necessary to allow the child to complete participation in a full-time drug program.[13]

If the child fails to fulfill the terms of the deferred disposition agreement, or if a new petition alleging that the child committed a delinquent act is filed during the period of the deferred disposition, the court can proceed with a disposition and impose any of the conditions permitted under the Children's Code.[14] If the child successfully completes the terms of the agreement, the court shall discharge the child from supervision, set aside the adjudication and dismiss the petition against the child with prejudice.[15]

A deferred dispositional agreement can be an ideal situation for a child, allowing him to receive services and supervision while providing him the opportunity to have his adjudication of delinquency set aside upon successful completion of the agreement terms. Unless the child is clearly unable to meet the terms of the dispositional agreement, there is little to lose in entering into such an agreement once a child has already been found delinquent and otherwise would be subjected to more restrictive consequences by the court.

9 Elizabeth Calvin, National Juvenile Defender Center, Legal Strategies to Reduce the Unnecessary Detention of Children (2004).
10 La. Child. Code Ann. art. 896(A) (2006).
11 La. Child. Code Ann. art. 896(B) (2006).
12 La. Child. Code Ann. art. 896(D) (2006).
13 *Id.*
14 La. Child. Code Ann. art. 896(E) (2006).
15 La. Child. Code Ann. art. 896(F) (2006).

II. DISPOSITION HEARING

A. Disposition Procedures

A disposition, or sentence, cannot be determined until after the court conducts a disposition hearing.[16] The disposition hearing may be held immediately following the adjudication and must be held within 30 days, unless the court extends such time for good cause.[17]

At the disposition hearing, the court shall hear evidence regarding whether the child is in need of treatment or rehabilitation.[18] However, the child may waive the presentation of such evidence.[19] At the disposition hearing, both the district attorney and the child may present evidence, cross-examine witnesses providing testimony at the hearing, controvert information contained in reports and cross-examine those individuals who prepared the reports.[20]

If the court determines, after the presentation of evidence, that the child is in need of treatment or rehabilitation, the court shall proceed immediately to make an appropriate disposition.[21] All parties shall be present when the court enters a judgment of disposition.[22] Before entering such judgment, the court must inform the parties orally and for the record of the considerations taken into account and the factual basis for imposing the particular disposition chosen.[23]

The court shall enter into the record a written judgment of disposition specifying all of the following:

a) The offense for which the child has been adjudicated a delinquent;

b) The nature of the disposition;

c) The agency, institution or person to whom the child is assigned;

d) The conditions of probation, if applicable;

e) Any other applicable terms and conditions regarding the disposition; and

f) The maximum duration of the disposition and, if committed to secure care, the maximum term of the commitment.[24]

16 La. Child. Code Ann. art. 892 (2006).
17 *Id.*
18 La. Child. Code Ann. art. 893(A) (2006).
19 *Id.*
20 La. Child. Code Ann. art. 893(C) (2006).
21 La. Child. Code Ann. art. 893(D) (2006).
22 La. Child. Code Ann. art. 902 (2006).
23 La. Child. Code Ann. art. 903(A)(1) (2006).
24 La. Child. Code Ann. art. 903(B) (2006).

B. Rules of Evidence During Disposition Hearing

Hearsay evidence is allowed in disposition hearings. All information that is deemed helpful may be relied upon "to the extent of its probative value even though not admissible at the adjudication hearing."[25] Oral and written reports, the pre-disposition investigation, mental evaluations and all other evidence presented by the child and the State may be considered by the court.[26] Moreover, the court, upon motion of the district attorney or the child, may hear testimony from the victim at the disposition hearing.[27]

C. Presentation of Treatment Plan

The treatment plan that has been developed should be presented at the disposition hearing. Counsel should utilize experts who assisted with the development of the plan, staff from programs who have agreed to work with the client, community members, mentors, parents and possibly the child as witnesses to address specifics of the plan and their respective roles in effectuating the plan.

D. Dispositional Alternatives Available to the Court

The Children's Code provides for various dispositional options for the court depending on the nature of the delinquent act of which the child has been adjudicated. Generally, the court has great discretion in determining a disposition. However, in some circumstances, the court must follow Children's Code guidelines and enforce specific dispositions.

1. Disposition After Adjudication for a Felony-Grade Delinquent Act

Once a child has been adjudicated for a felony-grade delinquent act, the court may do any of the following pursuant to the Children's Code:

> (1) Reprimand and warn the child and release him into the custody of his parents or some other suitable person, either unconditionally or subject to such terms and conditions as deemed in the best interests of the child and the public;
>
> (2) Place the child on probation;
>
> (3) Commit the child to the custody of a private or public institution or agency;
>
> (4) Commit the child to the custody of OYD;
>
> (5) Suspend the execution of the whole or part of any order of commitment and place the child on probation.[28]

25 La. Child. Code Ann. art. 893(B) (2006).
26 *Id.*
27 *Id.*
28 La. Child. Code Ann. art. 897 (2006).

If the court places the child on probation, the court shall order the following restrictions:

a) Prohibit the child from possessing any drugs or alcohol;

b) Prohibit the child from engaging in any further delinquent or criminal activity;

c) Prohibit the child from possessing a firearm or carrying a concealed weapon, if the child was adjudicated for any of the following offenses: first- or second-degree murder; manslaughter; aggravated battery; aggravated, forcible or simple rape; aggravated crime against nature; aggravated kidnapping; aggravated arson; aggravated or simple burglary; armed or simple robbery; burglary of a pharmacy; burglary of an inhabited dwelling; unauthorized entry of an inhabited dwelling; or any violation of the Uniform Controlled Dangerous Substances Law.[29]

The court also may impose any of the following terms and conditions that it deems to be in the best interests of the child and the public:

a) A requirement that the child attend school, if the school admits the child;

b) A requirement that the child perform court-approved community service activities;

c) A requirement that the child make reasonable restitution to any victim for any personal or property damage caused by the child in the commission of the delinquent act;

d) A requirement that the child participate in any program involving medical, psychological, or other treatment found necessary for his rehabilitation;

e) A requirement suspending or restricting the child's driving privileges;

f) A requirement prohibiting the child from possessing a firearm or carrying a concealed weapon; and

g) A requirement that the child pay a supervision fee.[30]

The court cannot impose a judgment of disposition which would exceed the maximum term of imprisonment for the felony underlying the adjudication.[31] The court must give the child credit for time served in detention before the disposition.[32]

29 La. Child. Code Ann. art. 897(B)(1) (2006).
30 La. Child. Code Ann. art. 897(B)(2) (2006).
31 La. Child. Code Ann. art. 898(A) (2006).
32 *Id.*

If the child was under 13 at the time of commitment to the custody of OYD, the judgment of disposition must terminate upon the child's 18th birthday.[33] Under no circumstances may a child be committed to custody for a period extending beyond his 21st birthday.[34]

2. Disposition Under Article 897.1: Juvenile Life

If a child is adjudicated delinquent for one of the following offenses and is 14 years old or older at the time of the commission of the offense, the court must commit the child to OYD until the child's 21st birthday without the possibility of parole, probation, suspension of imposition or execution of sentence, or modification of sentence:

a) first-degree murder;

b) second-degree murder;

c) aggravated rape;

d) aggravated kidnapping.[35]

If a child is adjudicated delinquent for the offense of armed robbery and was 14 years old or older at the time of the commission of the act, the court shall commit the child to the custody of OYD for a specific term imposed by the court without the possibility of parole, probation, suspension of imposition or execution of sentence, or modification of sentence.[36] Note, however, that, unlike the other charges covered by Article 897.1, the court has some discretion in sentencing a juvenile adjudicated delinquent for armed robbery, thereby opening up the possibility that the client will not be required to remain incarcerated until his 21st birthday.[37]

33 La. Child. Code Ann. art. 898(C)(1) (2006).
34 La. Child. Code Ann. art. 898(C)(5) (2006).
35 La. Child. Code Ann. art. 897.1(A) (2006).
36 La. Child. Code Ann. art. 897.1(B) (2006).
37 In *State in the Interest of A.M. and T.K.*, 98-CK-2752 (La. 07/02/99); 739 So.2d 188, the Louisiana Supreme Court clarified Article 897.1 for juveniles adjudicated delinquent for armed robbery, holding that Article 897.1 authorizes juvenile courts to use discretion in determining the length of commitment to the custody of OYD, but not for subsequent parole or early release determinations. *Id.* at 189. Prior to *State in the Interest of A.M. and T.K.*, the law was unclear as to whether the judge had discretion at disposition in armed robbery cases, and if so, whether Article 897.1 nonetheless prohibited the court from subsequently modifying a disposition order requiring that a juvenile adjudicated of armed robbery remain incarcerated until the age of 21. The Supreme Court determined that "R.S. 14:64, armed robbery," was supposed to be deleted from the text of Section A when the entirety of Section B was added, *id.* at 190, thereby giving juvenile courts authority to decide the appropriate length of sentence for armed robbery. However, Section B of art. 897.1 still mandated that "such commitments be made without benefit of parole, probation, suspension of imposition or execution of sentence, modification, or furlough." *Id.* at 191. Despite the continued viability of that language, La. C. Cr. P. art. 882 grants authority to the court to *correct* any sentence imposed by the court, stating that sentences "may be corrected at any time." La. Cr. C. P. art. 882 (emphasis added); *see also State ex rel Gregory Foucha v. Orleans Criminal District*, 93-1001 (La. 09/02/94); 642 So.2d 1274. This means that while the court may not "modify" a sentence imposed for a charge of armed robbery, it may instead "correct" the sentence and impose a new one that may be less harsh. Moreover, although La. Ch. C. art. 897.1(B) does preserve the juvenile court's discretion to determine the length of the sentence for a juvenile adjudicated delinquent on an armed robbery charge, the disposition must be with the express recognition by the court that such a commitment is without the benefit of future early release determinations, such as parole or furlough.

3. Disposition After Adjudication for a Misdemeanor-Grade Delinquent Act

If a child is adjudicated delinquent for a misdemeanor offense, the court may take any of the following actions:

a) Reprimand and warn the child and release him into the custody of his parents or some other suitable person, either unconditionally or subject to such terms and conditions as deemed in the best interests of the child and the public;

b) Place the child on probation;

c) Commit the child to the custody of a private or public institution or agency;

d) If the child is 13 years of age or older, commit the child to the custody of OYD;

e) Impose, but suspend, the execution of the whole or part of any authorized order of commitment and place the child on probation.[38]

If the court chooses to place the child on probation, the court also must:

a) Prohibit possession of any drugs or alcohol; and

b) Prohibit engagement in further delinquent or criminal activity.[39]

In addition to the restrictions above, the court may also include the following:

a) A requirement that the child attend school, if the school admits the child;

b) A requirement that the child perform court-approved community service activities;

c) A requirement that the child make reasonable restitution to any victim;

d) A requirement that the child participate in any program of medical, psychological or other treatment necessary for his rehabilitation;

e) A requirement suspending the child's driving privileges;

f) A requirement prohibiting the child from possessing a firearm or carrying a concealed weapon; and/or

g) A requirement that the child pay a monthly supervision fee.[40]

The judgment of disposition entered against the child cannot exceed the maximum term of imprisonment for the offense underlying the adjudication, unless the child is

38 La. Child. Code Ann. art. 899 (2006).
39 La. Child. Code Ann. art. 899(B)(1) (2006).
40 La. Child. Code Ann. art. 899(B)(2) (2006).

placed on probation, in which case the probation may extend for a maximum of two years or longer, if the child is involved in a full-time drug treatment program.[41]

4. General Dispositional Guidelines

Unless a child's welfare or the safety and protection of the public cannot otherwise be adequately protected, the court cannot remove a child from the custody of his parents.[42] The court should impose the *least restrictive disposition* authorized by the Children's Code, consistent with the circumstances of the case, the needs of the child, and the best interests of society.[43]

The court should consider the following factors in determining whether to place a child in the custody of OYD:

a) Whether there is an undue risk that during the period of suspended commitment or probation, the child will commit another crime;

b) Whether the child is in need of correctional treatment or a custodial environment that can be provided most effectively by his commitment;

c) Whether a lesser disposition will deprecate the seriousness of the child's delinquent act; and

d) Whether the delinquent act involved the illegal carrying, use or possession of a firearm.[44]

The court should consider the following factors in determining whether to suspend a disposition or to order probation:

a) Whether the child's delinquent conduct neither caused nor threatened serious harm;

b) Whether the child contemplated that his delinquent conduct would cause or threaten serious harm;

c) Whether the child acted under strong provocation;

d) Whether there were substantial grounds tending to excuse or justify the child's delinquent conduct;

e) Whether the victim induced or facilitated the delinquent conduct;

f) Whether the child or his family has compensated or will compensate the victim;

41 La. Child. Code Ann. art. 900 (2006).
42 La. Child. Code Ann. art. 901(A) (2006).
43 La. Child. Code Ann. art. 901(B) (2006).
44 La. Child. Code Ann. art. 901(C) (2006).

g) Whether the child has any history of prior delinquency or has led a law-abiding life for a substantial period of time leading up to the commission of the instant delinquent act;

h) Whether the child's delinquent conduct was the result of circumstances unlikely to recur;

i) Whether the character and attitude of the child indicate that he is unlikely to commit another delinquent act or crime;

j) Whether the child is particularly likely to respond affirmatively to probationary treatment; and

k) Whether the commitment of the child would entail excessive hardship to himself or his family.[45]

E. Disposition After Finding of Insanity

Following a determination at the adjudication hearing that the child was insane at the time of the offense, the court may choose one of the following dispositions:

1) Place the child in the custody of his parents or other suitable person under such terms and conditions as deemed in the best interests of the child and the public;

2) Place the child on probation in the custody of his parents or other suitable person under such terms and conditions as deemed in the best interests of the child and the public;

3) Commit the child to the Department of Health and Hospitals, Office of Mental Health, or an institution for the mentally ill, pursuant to Article 895 of the Children's Code.[46]

F. Disposition After Adjudication as Family in Need of Services

If the child has not been adjudicated delinquent, but there has been an adjudication that his family is in need of services (FINS), the court will proceed with a disposition hearing under Title VII of the Children's Code. The court may order a pre-disposition investigation[47] and may order that the child, other children in the family or the caretaker undergo a physical or mental examination and evaluation in preparation for the disposition.[48]

A FINS disposition hearing may be held immediately after the adjudication and must be held within 30 days after the adjudication, unless extended by the court for good cause.[49] The court may consider the predisposition investigation, mental evalua-

45 La. Child. Code Ann. art. 901(D) (2006).
46 La. Child. Code Ann. art. 894 (2006).
47 La. Child. Code Ann. art. 773 (2006).
48 La. Child. Code Ann. art. 774 (2006).
49 La. Child. Code Ann. art. 777(B) (2006).

tion reports and all evidence offered by the child, his caretaker, and the district attorney.[50] The court can consider evidence that would be inadmissible at the adjudication hearing.[51]

In crafting a disposition in a FINS case, the court "shall impose the least restrictive disposition which the court finds is consistent with the circumstances of the case, the needs of the child, and the best interests of society."[52] Upon entering into the record a judgment of disposition, the court must specify the following:

> 1) The nature of the disposition, including the responsibilities of the child, his caretakers, and public providers;
>
> 2) The maximum duration of the disposition;
>
> 3) The agency, institution or person to whom the child is assigned for oversight and the provision of services;
>
> 4) How the needed services are to be paid for;
>
> 5) Any other applicable terms and conditions regarding the disposition; and
>
> 6) A warning advising the youth that "if you do not obey each and every condition and rule of this order, you may be placed in a juvenile shelter or detention facility."[53]

The disposition will automatically remain in effect until the child's eighteenth birthday, unless the order specifies an earlier expiration or the order is later modified or vacated by the court.[54]

As part of the terms of the disposition, the court may take any of the following actions regarding any child of the family:

> 1) Order the child to submit to counseling or to psychiatric or psychological examination or treatment;
>
> 2) Order the child to cooperate in accepting particular services from any public or private institution or agency willing and able to provide him with needed services;
>
> 3) Place the child in the custody of a caretaker or other suitable person in the best interests of the child and the public;
>
> 4) Place the child on probation on such terms and conditions as deemed in the best interests of the child and the public;

50 La. Child. Code Ann. art. 778 (2006).
51 *Id.*
52 La. Child. Code Ann. art. 781(A) (2006).
53 La. Child. Code Ann. art. 782(A) (2006).
54 La. Child. Code Ann. art. 784 (2006).

5) Assign the child to the custody of a private or public institution or agency, except that the child shall not be placed in a correctional facility designed and operated exclusively for delinquent children; and/or

6) Make such other disposition or combination of the above as the court determines to be in the best interests of the child and the public.[55]

A court cannot remove a child from the custody of his caretakers unless the court determines that the child's welfare cannot be protected adequately without such removal.[56] If a court makes a determination to remove a child from the custody of his caretaker, the court must determine whether reasonable efforts have been made to reduce the need for removal of the child and to make it possible for the child to return home after removal.[57]

The court also may impose any of the following conditions directly upon the caretaker:

1) Order the caretaker to submit to counseling or to psychiatric or psychological examination or treatment;

2) Order the caretaker to cooperate in accepting particular services from any public or private institution or agency willing and able to provide him with needed services;

3) Order the caretaker to cooperate in connection with any part of the disposition order directly affecting the child; and/or

4) Impose any other conditions reasonably related to improving the family relationship.[58]

G. Commitment to Mental Institution

Article 895 of the Children's Code provides for the commitment of a child to a mental institution after a finding of delinquency, insanity or incompetence. Before ordering the commitment of a child to such a facility, the court must find that, "based on psychological or psychiatric evaluation, that the child has a mental disorder, other than mental retardation, which has a substantial adverse effect on his ability to function and requires care and treatment in an institution."[59]

H. Care and Treatment by the Office of Youth Development ("OYD")

When a child is committed to the custody of OYD, the child is committed to OYD generally and not to any particular OYD facility.[60] In addition, OYD "shall have sole authority over the placement, care, [and] treatment" of any child placed in its

55 La. Child. Code Ann. art. 779(A) (2006).
56 La. Child. Code Ann. art. 780(A) (2006).
57 La. Child. Code Ann. art. 780(B) (2006).
58 La. Child. Code Ann. art. 779(B) (2006).
59 La. Child. Code Ann. art. 895(A) (2006).
60 La. Child. Code Ann. art. 908(B) (2006).

custody.[61] While the juvenile court judge can make suggestions in its disposition order regarding preferred placement and treatment of a child, OYD has discretion to either comply with those wishes or not. A number of Louisiana courts have upheld OYD's discretion regarding the placement and treatment of youth in its care.[62] However, the juvenile court judge does have authority to rule that a child's treatment plan is inadequate and order OYD to review the plan and resubmit it for court review. The judge can then review the plan to determine whether the conditions of the disposition are being met,[63] and may remove the child from the custody of OYD if he or she is dissatisfied with the services the child is receiving.[64]

61 La. Child. Code Ann. art. 908(A) (2006).
62 *In re L.A.H.,* 02-1867 (La. App. 1st Cir. 12/20/02); 836 So.2d 447; *In re T.A.,* 00-2560 (La. 12/07/01); 801 So.2d 351; *In re R.F.,* 97-1056 (La. App. 5th Cir. 03/16/99); 733 So.2d 84.
63 *In re R.F.,* 733 So.2d at 85.
64 La. Child. Code Ann. art. 909 (2006).

PART III
POST-DISPOSITION ADVOCACY

CHAPTER 17

JUVENILE RIGHTS IN SECURE CARE AND THE IMPORTANCE OF ONGOING ADVOCACY

Even after adjudication and a disposition of commitment to secure custody, the law continues to demand the specialized treatment of children. Children placed in secure care have the right to humane living conditions, the right to rehabilitative treatment, the right to be protected from harm and the right to educational services. This chapter discusses the rights of children placed in secure care and important procedures and policies of the State's Office of Youth Development ("OYD").[1] It is important for juvenile defenders to be aware of these rights and policies so that continued representation and advocacy can be provided to youth placed in State custody.

I. CONSTITUTIONAL RIGHTS OF YOUTH IN SECURE CUSTODY

The Due Process Clause of the Fourteenth Amendment to the United States Constitution "requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[2] Federal courts have repeatedly held that where "the purpose of incarcerating juveniles in a state training school is treatment and rehabilitation, due process requires that the conditions and programs...must be reasonably related to that purpose."[3]

The Due Process Clause also makes applicable to the states the rights guaranteed United States citizens under the Eighth Amendment, which protects those incarcerated from cruel and unusual punishment.[4] The aim of the Eighth Amendment is to provide for dignity, civilized standards, humanity, and decency for incarcerated citizens.[5]

The Louisiana Constitution further protects persons from "unusual punishment."[6] Article I, § 2 and Article V, § 19 of the Louisiana Constitution govern the constitutional rights of incarcerated juveniles in Louisiana. Article 1, § 2 provides: "No person

1 The Office of Youth Development is the independent division of the Department of Public Safety and Corrections and is charged with running the Louisiana juvenile secure care facilities, many group homes, and probation and parole departments throughout the state. Louisiana Youth Services Office of Youth Development website *available at:* www.oyd.louisiana.gov (last visited Feb. 13, 2006) (containing statistics and information regarding locations of OYD's secure care facilities and regional probation and parole offices).

2 *Jackson v. Indiana,* 406 U.S. 715, 738 (1972).

3 *In re S.D.*, 02-0672 (La. App. 4th Cir. 11/21/02); 832 So.2d 415, 433–434 (citing *Morgan v. Sproat,* 432 F. Supp. 1130, 1135 (S.D. Miss. 1977)); *see also Alexander S. v. Boyd,* 876 F. Supp. 773, 796 (D.S.C. 1995); *Pena v. N.Y. State Div. for Youth*, 419 F. Supp. 203, 206–207 (S.D.N.Y. 1976); *Martarella v. Kelley,* 349 F. Supp. 575, 585 (S.D.N.Y. 1972).

4 U.S. Const. Amend. VIII.

5 *Estelle v. Gamble,* 429 U.S. 97, 102 (1976); *Victoria W. v. Larpenter*, 369 F.3d 475, 483 (5th Cir. 2004).

6 La. Const. art. I, § 20.

shall be deprived of life, liberty, or property except by due process of law."[7] The Louisiana Supreme Court has held that the rights guaranteed by Article I, § 2 actually exceed those guaranteed by the Fourteenth Amendment to the United States Constitution, noting that "the individual rights guaranteed by our state constitution's declaration of individual rights (Article I) represent more specific protections of the individual against governmental power than those found in the federal constitution's bill of rights, and they may represent broader protection of the individual."[8]

In concurrence with the enhanced protection of individual rights provided through Louisiana's due process clause, juveniles adjudicated delinquent of crimes have the constitutional right to "special juvenile procedures."[9] The Louisiana Supreme Court has interpreted this clause to dictate "a general rule of 'non-criminal' treatment of juveniles."[10] The Louisiana Supreme Court has indicated that "the unique nature of the juvenile system is manifested in its noncriminal, or 'civil,' nature, *its focus on rehabilitation and individual treatment* rather than retribution, and the State's role as parens patriae in managing the welfare of the juvenile in state custody."[11]

Three years later, the Louisiana Supreme Court reaffirmed the holding above and wrote, "[t]he juvenile justice system dates back to the early 1900s and was founded as a way to both nurture and rehabilitate youths."[12]

Indeed, the provisions of the Louisiana Children's Code not only highlight the juvenile justice system's focus on rehabilitation and individual treatment, but specifically point to the State's duty to act as a parent with respect to children in custody. Article 102 provides:

> The provisions of this Code shall be liberally construed to the end that each child and parent coming within the jurisdiction of the court shall be accorded due process and that each child shall receive, preferably in his own home, the care, guidance, and control that will be conducive to his welfare. In those instances when he is removed from the control of his parents, *the court shall secure for him care as nearly as possible equivalent to that which his parents should have given him*.[13]

It is this duty to act as a "parent" that empowers courts exercising juvenile jurisdiction to review dispositions and intervene in the lives of incarcerated youth. For example, in *In re S.D.,* the Louisiana Fourth Circuit Court of Appeals found that the Swanson Correctional Center for Youth-Madison Parish Unit ("Tallulah") violated S.D.'s constitutional rights.[14] The court found "the conditions of S.D.'s con-

7 La. Const. art. I, § 2.
8 *Guidry v. Roberts,* 335 So.2d 438, 448 (La. 1976).
9 La. Const. art. V, § 19.
10 *In re C.B.,* 97-2783, 9 (La. 03/11/98); 708 So.2d 391, 396.
11 *Id.* (emphasis added).
12 *In re D.J.,* 01-2149, 4 (La. 05/14/02); 817 So.2d 26, 29.
13 La. Child. Code Ann. art. 102 (2006) (emphasis added); *see also* La. Child. Code Ann. art. 801 (2006) (mandating the least restrictive disposition and care equivalent to parental treatment).
14 *In re S.D.,* 02-0672 (La. App. 4th Cir. 11/21/02); 832 So.2d 415.

finement and the lack of individual rehabilitative treatment at the Tallulah facility... unconstitutional."[15]

A. The Right to Rehabilitation

As stated above, the Fourteenth Amendment's Due Process Clause requires that when the purpose of incarcerating juveniles is for treatment and rehabilitation, the nature and conditions of commitment must be related to that purpose. The Louisiana Constitution and the Louisiana Children's Code make clear that the purpose of confinement of a delinquent child in a secure care facility is for the purpose of rehabilitation. Coupled with the federal due process right, it is clear that a child incarcerated in Louisiana under the jurisdiction of the Children's Code is entitled to rehabilitation.

B. The Right to Humane Conditions of Confinement

Children in the custody of the State have a constitutional right to adequate food, shelter, clothing and medical care, as well as the right to freedom from bodily restraint.[16] An Eighth Amendment violation occurs if an official's act or omission results in the denial of "the minimal civilized measure of life's necessities."[17]

The conditions of confinement must be sanitary and hygienic. The deprivation of basic elements of hygiene is "so base, inhuman, and barbaric" that it violates the Eighth Amendment.[18] The United States Fifth Circuit Court of Appeals held that filthy cell conditions constituted an Eighth Amendment violation because the conditions exposed the prisoners to a risk of serious harm to which correction officials had displayed deliberate indifference.[19] In another prison conditions case, the Fifth Circuit determined that a prisoner was subjected to cruel and unusual punishment when he was confined repeatedly to a roach-infested and unlighted cell into which foul rainwater and backed-up sewage leaked.[20]

C. The Right to Personal Safety and Protection from Harm

The use of excessive force or corporal punishment manifestly violates a child's due process rights under the Fourteenth Amendment to the United States Constitution.[21] The Eleventh Circuit Court of Appeals of the United States held that a juvenile detainee's right to bodily integrity is properly analyzed under the Fourteenth Amendment, but further held that abuse by a prison guard would "clearly violate her rights under the Eighth Amendment as well."[22] A prison official has violated

15 832 So.2d at 437.
16 *Del A. v. Roemer,* 777 F. Supp. 1297, 1318 (E.D. La. 1991).
17 *Burleson v. Tex. Dep't of Crim. Justice*, 393 F.3d 577, 589 (5th Cir. 2004) (quotation omitted).
18 *Palmer v. Johnson,* 193 F.3d 346, 352 (5th Cir. 1999) (quotation omitted).
19 *Gates v. Cook*, 376 F.3d 323, 338 (5th Cir. 2004).
20 *McCord v. Maggio*, 927 F.2d 844, 846-47 (5th Cir. 1991).
21 *In re S.D.*, 02-0672 (La. App. 4th Cir. 11/21/02); 832 So.2d 415, 434 (citing *Nelson v. Heyne*, 355 F. Supp. 451, 454 (N.D. Ind. 1972) (beatings with a paddle), *aff'd*, 491 F.2d 352 (7th Cir. 1974); *Morales v. Turman*, 383 F. Supp. 53, 72–75 (E.D. Tex. 1974) (physical beatings and use of tear gas), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd on other grounds*, 430 U.S. 322 (1977); *Milonas v. Williams*, 691 F.2d 931, 942 (10th Cir. 1982) (grabbing children by the hair, pulling them backward and flinging them against walls)).
22 *K.M. v. Ala. Dep't of Youth Servs.*, 360 F. Supp. 2d 1253, 1259 (11th Cir. 2005).

the Eighth Amendment rights of a prisoner when he "1) shows a subjective deliberate indifference to 2) conditions presenting a substantial risk of serious harm to the inmate."[23] The Louisiana Second Circuit Court of Appeals found that the test regarding "whether prison authorities have violated their legal duty regarding prisoner welfare is one of ordinary or reasonable care."[24] Prison officials have a "duty to use reasonable care to protect inmates from harm."[25]

A prison official "knows of" excessive risk to an prisoner's health or safety, and is thus deliberately indifferent and potentially in violation of the Eighth Amendment for failure to protect that prisoner, "if (1) he is aware of facts from which he could infer that a substantial risk of serious harm exists, and (2) he in fact draws that inference."[26]

D. The Right to Medical and Mental Health Care

States must maintain minimally adequate mental health treatment systems in juvenile correctional facilities.[27] In *In re S.D.,* the Louisiana Fourth Circuit Court of Appeals wrote that "minimally adequate mental health treatment should include trained staff providing services that may include the following: emergency mental health services, a professional evaluation and development of a treatment plan, periodic follow-up evaluations, and regular mental health services, including counseling."[28]

The U.S. Third Circuit Court of Appeals held that a juvenile detention center could be held liable for lack of sufficient services to address the needs of juveniles with mental or physical health problems.[29]

II. EDUCATIONAL RIGHTS WHILE INCARCERATED

States must also provide juveniles in juvenile prison with an adequate educational program.[30] Youth in custody are entitled to a free and appropriate public education.[31] This right is no less powerful for youth in custody than it is for youth living at home. As a corollary, youth in custody must receive all the rights to special education afforded to youth and citizens not in custody.[32]

23 *Gates*, 376 F.3d at 333.
24 *Morris v. Union Parish Police Jury*, 39, 709 (La. App. 2nd Cir. 05/11/05); 902 So.2d 1276, 1278.
25 *Conerly v. State*, 02-1852 (La. App. 1st Cir. 06/27/03); 858 So.2d 636, 645.
26 *Adames v. Perez*, 331 F.3d 508, 512 (5th Cir. 2003) (quotations omitted).
27 *In re S.D.*, 02-0672 (La. App. 4th Cir. 11/21/02); 832 So.2d 415, 434; *see also Youngberg v. Romeo*, 457 U.S. 307, 322 (1982) (holding that substantive due process includes right to minimally adequate training for involuntarily committed mentally retarded persons).
28 *In re S.D.*, 832 So.2d at 434 (citing *Gary W. v. Louisiana*, 437 F. Supp. 1209, 1219 (E.D. La. 1976) (requiring individualized assessments and treatment programs for mentally retarded, physically handicapped, and delinquent children in custody of state)).
29 *A.M. ex rel. J.M.K. v. Luzerne County Juvenile Det. Ctr.*, 372 F.3d 572, 584-85 (3d Cir. 2004).
30 *In re S.D.*, 832 So.2d at 434.
31 *See* La. Rev. Stat. Ann. § 17:1941 (2006).
32 Individuals with Disabilities Education Act (IDEA), 20 U.S.C. •• 1400, 1401, 1415 (West 2006); *see also* 34 C.F.R. § 300.2

Generally, the special education rights and remedies for children with disabilities (as described in Chapter 6 of this manual) also apply to children who are incarcerated or placed in state-run mental health facilities. The Louisiana Department of Education has created an educational service agency known as Special School District ("SSD"), which has jurisdiction over "all students with disabilities enrolled in residential facilities operated by DHH [Department of Health and Hospitals] or DPS&C [now known as OYD], eligible students enrolled in facilities operated by OMH [Office of Mental Health], eligible students placed by DPS&C in certain privately-operated secure juvenile correctional facilities, and students placed by SSD in an LEA [Local Education Agency]."[33] Whenever a child is in an institution that falls under the jurisdiction of SSD, that agency "shall be responsible for either providing or causing to be provided all needed educational services to each student in full compliance" with the following state regulations:[34]

> 1. The necessary certified personnel to ensure the performance of an Individual Evaluation for each student within its jurisdiction;
>
> 2. The development and implementation of an Individualized Education Program ("IEP") for each student with a disability;
>
> 3. Adequate administrative and instructional personnel to implement each student's educational plan;
>
> 4. Adequate personnel to establish and maintain the appropriate relationships with each affected LEA to provide for a smooth transition of educational services for each student leaving SSD;
>
> 5. Transmission of all educational records of a student leaving SSD to the LEA in which the student will be enrolled or will seek to be enrolled; and
>
> 6. Adherence to all procedural safeguards of [the special education regulations].[35]

Therefore, juveniles enrolled in juvenile correctional and mental health facilities run by the State share the same protections of disabled children in regular school districts.

(2006). Youth with disabilities are also protected against disability-based discrimination by the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 (West 2006).

33 La. Admin. Code tit. 28, pt. XLIII, § 631 (2006).

34 La. Admin. Code tit. 28, pt. XLIII, § 630(A) (2006).

35 *Id.*

III. OYD POLICIES AND PROCEDURES

In Louisiana, children committed to secure custody are placed in the care of the Office of Youth Development. OYD has three secure care facilities in Louisiana located in Monroe (Swanson Center for Youth), Bridge City (Bridge City Center for Youth) and Baker (Jetson Center for Youth). Generally, a child placed in OYD custody is first transferred from his local detention center to the Juvenile Reception and Diagnostic Center ("JRDC") at Jetson for assessment, then transferred to a dormitory at one of the three secure care facilities around the state.

A. Assessment and Placement

At JRDC, youth undergo a basic medical examination, a biopsychosocial evaluation and a psychological evaluation. Children also undergo an educational assessment. JRDC administers the Test of Adult Basic Education ("TABE") to determine the grade-level equivalent of the child in custody. These evaluations are performed by Louisiana State University Health Science Center ("LSU") pursuant to a federal settlement agreement and contract with OYD. The biopsychosocial evaluation is meant to provide social and clinical observations of the child. In addition, the evaluation reports on the child's history of court involvement, family dynamics and mental health history.

At the conclusion of these assessments, LSU proposes a course of treatment and counseling. The recommendations are incorporated into the Individualized Intervention Plan ("IIP") crafted for each child entering secure care. OYD personnel then determine to which facility the child will be transferred. In addition, OYD performs an initial custody classification that decides privileges and the length of time a child will remain in custody before his earliest possible consideration for early release. The child will continue to be reclassified every three months, or quarterly, from the initial classification.

B. Custody Classification

There are three levels of classification within OYD custody. A child can achieve a maximum, medium or minimum custody level. The custody classification is based on a number of factors, including the number of disciplinary reports the child has received while incarcerated, program participation, and the nature of the delinquency charge. Every three months, a youth undergoes a reclassification, or "staffing," which dictates his custody level for the next three months. OYD issues a progress report to the juvenile court judge after each reclassification to advise the court of the child's progress and classification status.

If a child has received minimum custody classifications and/or progressed while in OYD custody, OYD may hold a staffing to determine the child's eligibility for a recommendation for early release from secure care. If OYD determines that the child is appropriate for an early release, the agency generally will inform the court of this in its next written progress report, and OYD attorneys or the child's probation officer

may file a Motion for Modification of the child's disposition of confinement to secure care.[36]

C. Administrative Review Procedure ("ARP")

When a child is committed to the custody of OYD, she has the right to file a grievance concerning her care, custody or control.[37] This grievance procedure is called an Administrative Remedy Procedure and is governed by the Louisiana Administrative Code and by internal policies and procedures of OYD.[38] While a child can file an ARP on her own, it is advisable that the child's counsel assist her with the ARP to ensure that the procedures are complied with, thus preserving her right to seek judicial review and to take other appropriate legal action.

An ARP must be filed within 90 days of the incident complained of, and ARP complaint forms can be obtained by youth at OYD facilities.[39] However, an ARP complaint can be made on any type of paper and need only state "This is an ARP" and set forth the complaint and the remedy requested.[40] Initial ARP complaints are to be submitted to the director of the facility and are processed by the ARP coordinator.[41] Initial complaints are either accepted or rejected for investigation. A complaint may be rejected if it fails to comply with the form and timeline outlined above.[42] Once the complaint has been received and accepted, the director has 21 days to respond.[43] If the complaint is denied, the youth has 10 days to appeal the denial and file a Step Two Review Request, which should be submitted to the facility director or ARP coordinator at the facility, and to the Secretary of OYD.[44] A final decision on the Step Two appeal must be provided within 21 days of submission.[45]

When a child has exhausted all of her administrative remedies, she may seek judicial review of the OYD denial of her grievance by applying for judicial review with the juvenile court that ordered her commitment in the first instance.[46] Judicial review must be sought within 30 days from the day that she receives the decision denying her Step Two appeal.[47] A child may request judicial review with or without the assistance of counsel. If the child represents herself in the matter, she may write a letter to the court outlining the facts of her complaint and the steps she took to make an administrative complaint.[48] If the child is represented by counsel, the application of

36 Due to the ongoing reconfiguration of OYD, the agency's policies and procedures regarding classifications and recommendations for early release are being revised. Updated OYD policies may be requested from OYD headquarters in Baton Rouge.
37 La. Child. Code Ann. art. 912(A) (2006).
38 La. Admin. Code tit. 22, pt. 1, § 326 (2006).
39 La. Admin. Code tit. 22, pt. 1, § 326(E)(3)(b) (2006).
40 La. Admin. Code tit. 22, pt. 1, •• 326(E)(3)(a), (c) (2006).
41 La. Admin. Code tit. 22, pt. 1, § 326(E)(4) (2006).
42 *Id.*
43 La. Admin. Code tit. 22, pt. 1, § 326(F) (2006).
44 La. Admin. Code tit. 22, pt. 1, § 326(G)(1) (2006).
45 La. Admin. Code tit. 22, pt. 1, § 326(G)(3) (2006).
46 La. Child. Code Ann. art. 912(B) (2006).
47 La. Admin. Code tit. 22, pt. 1, § 326(H)(1) (2006).
48 La. Child. Code Ann. art. 912(C) (2006).

review to the court must be in the form of a petition.[49] If the court determines that administrative remedies have been exhausted and that the grievance has merit, the court shall hold a contradictory hearing to resolve the child's grievance.[50]

Exhausting the administrative remedies of the ARP process is also necessary before the child can take action in federal or state court for redress of her grievances, for monetary damages, or for injunctive relief as a result of conditions in a juvenile prison facility.[51]

D. Project Zero Tolerance ("PZT")

In August 1996, Louisiana's Department of Public Safety and Corrections ("DPSC") created the Project Zero Tolerance system as a means to investigate and appropriately respond to any and all allegations of abuse against staff and youth within Louisiana's juvenile secure care facilities. PZT was developed in response to concerns about violence and abuse identified by Human Rights Watch and the United States Department of Justice.

Currently, each juvenile secure care facility in Louisiana has a PZT investigation staff, and a central PZT office is located at OYD's central headquarters in Baton Rouge. Children or facility staff may make reports to PZT regarding incidents of abuse in the facilities. Youth can call the PZT hotline from telephones located in the dormitories and from other locations at the facilities. Parents and other concerned persons can also make a PZT hotline report by calling 1-800-626-1430 and leaving a message regarding the nature of the complaint or incident.

When a report of abuse, violence, or other misconduct is made to PZT, investigators are required to investigate the alleged incident and issue a report. Upon the conclusion of the investigation, PZT will determine whether the allegation is substantiated or unsubstantiated. PZT investigates incidents in which either staff or youth are the alleged aggressors. PZT reports often include information regarding interviews with staff and youth, observations of video surveillance of the incident, and documentation of the incident. PZT reports are kept at the central PZT office once completed. When investigating an issue involving the client, counsel should subpoena any relevant PZT reports involving the client and all PZT reports involving any facility staff members involved in an incident with the client.

49 *Id.*

50 La. Child. Code Ann. art. 912(D) (2006).

51 42 U.S.C. § 1997e (2006). The Prison Litigation Reform Act of 1995 ("PLRA") requires exhaustion of administrative remedies before filing suit over prison conditions. According to the Supreme Court's interpretation of the PLRA, a prisoner must exhaust administrative remedies "irrespective of the forms of relief sought and offered through administrative avenues." *Booth v. Churner,* 532 U.S. 731, 741 n.6 (2001). The Louisiana Corrections Administrative Remedy Procedure Act (CARP) and the Louisiana Prison Litigation Reform Act provide administrative procedures for prisoner complaints and require exhaustion of those procedures before the filing of a complaint. La. Rev. Stat. Ann. •• 15:1171–1179 (2006); La. Rev. Stat. Ann. •• 15:1181–1191 (2006). If administrative remedies or procedures exist, then the burden shifts to the plaintiff to show that the remedies have been exhausted or that the present situation is one in which the plaintiff is "entitled to judicial relief because any administrative remedy is irreparably inadequate." *Cheron v. LCS Corr. Servs., Inc.* 02-1049, 15 (La. App. 1st Cir. 02/23/04); 872 So.2d 1094, 1103, *aff'd,* 04-0703 (La. 01/19/05); 891 So.2d 1250.

CHAPTER 18
MODIFICATION OF DISPOSITION

The role of an advocate continues beyond the adjudication and disposition when representing a child in delinquency court. Every child that is given a disposition of secure care, as discussed in the previous chapter, has a broad spectrum of rights that needs to be protected. Therefore, the need for post-disposition advocacy is particularly important for juvenile clients. This chapter discusses advocacy as it relates to modifications of dispositions and methods for effectuating the release of youth who are placed in secure care or other out-of-home placements by the court.

I. RIGHT TO MODIFICATION UNDER LAW

Under the Louisiana Children's Code, the juvenile court entering a disposition against a child has an ongoing obligation to monitor the progress of that child and to ensure that the child receives "the care, guidance, and control that will be conducive to his welfare."[1] If a child is placed in secure care, "[t]he juvenile court is responsible for ensuring that the juvenile is held in a safe environment and is receiving the kind of care that he should have received if he had not been removed from his family."[2]

A court entering a judgment of disposition in a delinquency case retains the authority to modify the disposition at any time by changing the child's legal custody, suspending any part of the disposition order, discharging conditions of probation, adding other conditions, or terminating the order of disposition altogether, thereby releasing the child from court supervision.[3] However, the court may not modify dispositions in cases governed by Article 897.1 of the Children's Code, which provides for mandatory dispositions of secure care for first- and second-degree murder, aggravated rape, kidnapping and armed robbery.[4]

A. Modification Procedure

To effectuate a modification of disposition, counsel must file the appropriate motion with the court. A motion for modification can be filed by the child, the district attorney, the custodian of the child, a probation officer or by the court itself.[5] The motion must set forth "in plain and concise terms the facts supporting the modification."[6] Any motion for modification may be denied without the benefit of a

1 La. Child. Code Ann. art. 102 (2006).
2 *Robshaw v. Stalder*, Civil Action No. 98-886-D, Order and Ruling at 8 (M.D. La., June 4, 2003).
3 La. Child. Code Ann. art. 909 (2006).
4 *Id.*; La. Child. Code Ann. art. 897.1 (2006).
5 La. Child. Code Ann. art. 910(A) (2006).
6 *Id.*

hearing.[7] However, the court may not abuse its discretion in denying a motion for modification.[8]

If the motion for modification by the child requests the imposition of less restrictive conditions, the court may modify the disposition accordingly without providing a contradictory hearing to the parties.[9] However, if the motion seeks to modify the disposition through the imposition of more restrictive conditions, the court must provide the child the opportunity for a contradictory hearing.[10]

The Office of Youth Development ("OYD") often files motions to modify the disposition of children in its custody when a child has made a certain degree of progress. When OYD files a motion requesting a modification to a less restrictive setting, the court must provide a contradictory hearing to the district attorney on the issue unless the district attorney files an affidavit averring no objection to the motion.[11] A child may not be released from OYD custody until three days' notice has been given to the district attorney and to OYD.[12]

B. Mental Health Commitment and Modification

In cases in which the child has been committed to the Department of Health and Hospitals ("DHH"), Office of Mental Health ("OMH") or an institution for the mentally ill, the court may modify the judgment upon motion of the department or superintendent of the institution.[13] If the child was adjudicated delinquent and placed in the custody of such an institution, the court may not modify the disposition to cause the release of the child until three days' notice has been provided to the district attorney and the department or institution.[14] If the child is in the custody of such a department or institution because of a finding of insanity, the child may not be released without a contradictory hearing.[15]

II. GROUNDS FOR MODIFICATION

As previously outlined, a trial court retains the discretion to modify a disposition at any time, except as restricted by Article 897.1. The court's discretion should be measured against the duty and responsibility of courts exercising juvenile jurisdiction to act as a parent and to ensure the appropriate treatment and rehabilitation of juveniles in the least restrictive setting. A judge should not exercise this discretion without employing the operation of a judicial mind. That is, when consider-

7 La. Child. Code Ann. art. 910(B) (2006).
8 *In re C.H.,* 03-1279, 4 (La. App. 3d Cir. 01/28/04); 865 So.2d 947, 950.
9 La. Child. Code Ann. art. 910(C) (2006).
10 La. Child. Code Ann. art. 910(D) (2006).
11 La. Child. Code Ann. art. 911(A) (2006).
12 La. Child. Code Ann. art. 911(B) (2006).
13 La. Child. Code Ann. art. 916(A) (2006).
14 La. Child. Code Ann. art. 916(B) (2006).
15 La. Child. Code Ann. art. 916(C) (2006).

ing a motion for modification, the court must weigh the allegations presented in the motion, consider any oppositional arguments, and provide a ruling based on the facts set before it.

While judicial authority and responsibility are clear with respect to juveniles in the care of the State, little case law exists to explain the exact nature of the proper showing on a motion to modify disposition. However, the laws of Louisiana are instructive. Under the Louisiana Children's Code, a motion to modify disposition entails a reexamination of the initial disposition entered by the court. Therefore, it stands to reason that the motion to modify disposition is governed by the same rules and guidelines as a disposition hearing. These rules and guidelines are stated in Article 893 of the Children's Code, which reads, in relevant part:

> (a) ...the court shall hear evidence as to whether the child is in need of treatment or rehabilitation and shall make and file its findings.
>
> (b) All evidence helpful in determining the proper disposition, including oral and written reports, the report of the predisposition investigation, any reports of mental evaluation, and all other evidence offered by the child or the State shall be received by the court and may be relied upon to the extent of its probative value even though not admissible at the adjudication hearing.[16]

Article 901 of the Children's Code provides discretionary boundaries for juvenile courts as they make dispositional determinations and reads, in relevant part:

> (a) In considering dispositional options, the court shall not remove a child from the custody of his parents unless his welfare or the safety and protection of the public cannot, in the opinion of the court, be adequately safeguarded without such removal.
>
> (b) The court should impose *the least restrictive disposition* authorized by Articles 897 through 900 of this Title which the court finds is consistent with the circumstances of the case, the needs of the child, and the best interest of society.[17]

The Louisiana legislature has further provided:

> [I]t is hereby declared to be the public policy of this state that commitment of a juvenile to the care of the department [OYD] is not punitive nor in anywise to be construed as a penal sentence, but as a step in the total treatment process toward rehabilitation of the juvenile and that, therefore, the recommendations of the department should be given

16 La. Child. Code Ann. art. 893 (2006).
17 La. Child. Code Ann. art. 901 (2006) (emphasis added).

> careful consideration by the court in determining what is to be the best interest of the juvenile....[18]

A motion to modify disposition ought to marshal facts evidencing a change in circumstances, issues of inadequacy of treatment, inappropriateness of placement, issues of abuse or conditions problems, or issues regarding the youth's treatment or rehabilitation which were not confronted by the juvenile court at the time of the initial disposition. Following are some potential theories that may serve as the basis for a motion for modification of disposition.

A. Progress in Secure Care/Rehabilitation Complete

One compelling factor in support of a modification of disposition of secure care is that the child has made progress, exhibited good behavior, and completed the treatment services available for rehabilitation in the secure care facility. A child who has completed group counseling workshops, cooperated with mental health treatments and counseling, done well in school, avoided disciplinary problems, and obtained minimum custody levels in the secure care facility, or otherwise experienced vast improvements in behavior and attitude has exhibited readiness to reenter his community.

If OYD has recommended that a youth's disposition be modified from secure care to non-secure care, as is often the case when a child has made improvements, exhibited positive behavior, and cooperated with treatment services, that recommendation should be given great weight by the court.[19] When a child has met OYD's internal criteria for a recommendation of early release, OYD attorneys or probation officers will often file motions for modification. Multiple motions for modification are beneficial for the child and increase his chances for an early release. The fact that OYD has filed a motion should not discourage counsel from also filing one on behalf of the client. An additional motion by the child may be beneficial because OYD's recommendations for the modification may be different from the recommendations for which counsel may advocate. For instance, OYD may recommend that the child be released from secure care and placed in a group home. By contrast, the child may desire release back to his home and community, thus prompting counsel to present a release plan that would make this option practical.

If evidence is presented to a court that a youth has cooperated with and completed all rehabilitative services offered and identified as necessary for his treatment, then that youth's disposition should be modified accordingly. In a case in which the child has "availed himself of every rehabilitative program available," one court has held that the child is actually "entitled to a modification of disposition."[20]

18 La. Rev. Stat. Ann. § 15:906(A)(2) (2006).
19 *Id.*
20 *In re C.H.*, 03-1279, 4 (La. App. 3d Cir. 01/28/04); 865 So.2d 947, 950.

B. Abuse and Other Conditions Problems

The use of excessive force or corporal punishment manifestly violates a child's due process rights under the Fourteenth Amendment to the United States Constitution.[21] If counsel learns that the client is being mistreated or abused by facility staff, or is otherwise suffering as a result of inadequate or unconstitutional facility conditions, counsel should bring this information to the attention of the court and request a modification of disposition and placement of the child in another facility or in his community, where he can receive adequate services and protection from harm.

The Louisiana Children's Code provides that when a child is removed from his parent's control, the court shall "secure for him care as nearly possible equivalent to that which the parents should have given him."[22] The Children's Code is instructive in determining what constitutes "care as nearly as possible equivalent" to that which a child's parent owes him. In Child in Need of Care proceedings, the State may take a child out of his parent's custody and place the child in State custody if there are reasonable grounds to believe a child is a) "the victim of abuse perpetrated, aided, or tolerated by the parent or caretaker...and his welfare is seriously endangered if he is left within the custody or control of that parent or caretaker" or b) "a victim of neglect."[23] "Abuse" is defined in part as "[t]he infliction, attempted infliction, or, as a result of inadequate supervision, the allowance of the infliction or attempted infliction of physical or mental injury upon the child by the parent or any other person."[24] "Neglect" is defined as "the refusal or failure of a parent or caretaker to supply the child with necessary food, clothing, shelter, care, treatment, or counseling for any injury, illness, or condition of the child, as a result of which the child's physical, mental, or emotional health is substantially threatened or impaired."[25] Thus, in order for the juvenile court to protect a juvenile's constitutional rights in delinquency proceedings, it must ensure that a child receives care that as nearly as possible does not constitute abuse or neglect. If the client is suffering from abuse or neglect in State custody, a motion for modification should be filed on this basis.

As one court has noted regarding the conditions of one juvenile secure care facility in Louisiana:

> S.D.'s placement in state secure custody was for the avowed purpose of rehabilitation. Simply put, the goal was to take a young life and try to get it back on track—while there was still time and hope—so that he might come to live as a full member of society. Instead, he wound up in a place

21 *In re S.D.*, 02-0672 (La. App. 4th Cir. 11/21/02); 832 So.2d 415, 434 (citing *Nelson v. Heyne*, 355 F. Supp. 451, 454 (N.D. Ind. 1972) (beatings with a paddle), *aff'd*, 491 F.2d 352 (7th Cir. 1974); *Morales v. Turman*, 383 F. Supp. 53, 72–75 (E.D. Tex. 1974) (physical beatings and use of tear gas), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd on other grounds*, 430 U.S. 322 (1977); *Santana v. Collazo*, 533 F. Supp. 966, 989 (D.P.R. 1982) (beatings of children who escaped from institution and were recaptured), *aff'd in part and vacted in part*, 714 F.2d 1172 (1st Cir. 1983); *Milonas v. Williams*, 691 F.2d 931, 942 (10th Cir. 1982) (grabbing children by the hair, pulling them backwards, and flinging them against walls)).

22 La. Child. Code Ann. art. 102 (2006).

23 La. Child. Code Ann. art. 606 (2006); *see also* La. Child. Code Ann. arts. 619, 626 (2006).

24 La. Child. Code Ann. art. 603(1)(a) (2006).

25 La. Child. Code Ann. art. 603(14)(a) (2006).

> that maintains order through fear, force and violence. The atmosphere of fear at Tallulah supports a culture of violence sadly manifested by the high number of violent physical injuries sustained by incarcerated youth—from whatever cause—at that facility.
>
> We cannot reasonably expect young men incarcerated under these conditions to ever feel physically safe and emotionally secure, such that they might benefit from treatment or that the rehabilitative process might begin. No human being fearful of physical attack can focus on anything but survival—wherein survival is defined as no harm done.[26]

C. Inappropriate Placement

Another potential theory in support of modification of disposition is that a child has been placed in a facility that is not appropriate, given her needs and abilities. For instance, a child with severe mental health problems may have difficulty thriving and progressing at an OYD secure care facility, despite the mental health programming available there. Some children may need more intensive mental health services in a mental health facility or hospital setting. A child with severe mental health problems also may benefit less from institutionalization and more from placement in her community or with her family, while receiving intensive treatment services. This is a sensitive area of advocacy. This is due, in part, to the fact that counsel will be unable to advocate for placement of the client in a mental facility or hospital without her consent, even if that is what counsel personally believes to be in the best interest of the client. Some youth may, however, understand their special needs and desire such a placement; but most would prefer to receive intensive services while residing at or near their home.

In other circumstances, a child may be regressing in a secure care facility and not benefiting from the programming available to her there. It may be appropriate to try an alternative placement for the child, such as a smaller community-based group home or intensive services within her home. Juvenile judges are often reluctant to modify the disposition of a child to a less secure setting when the child is exhibiting negative behaviors and failing to cooperate with the facility staff and programming. They view this as rewarding the child for misbehaving. The important role of the advocate in such situations is to educate the judge about the specific capabilities of the child and argue that the child is not deliberately acting out, but is exhibiting a need for alternative treatment. In a case such as this, it is advisable to obtain expert assistance in the development of an alternative plan, as well as for the purpose of testifying regarding the child's particular needs. Including an expert affidavit as an attachment to the motion and presenting expert testimony at the modification hearing can go a long way in informing the judge of the specific needs of the client.

26 *In re S.D.,* 832 So.2d at 437. The facility described in *S.D.* no longer holds juveniles.

D. Lack of Rehabilitative Treatment

Another theory in support of release of a child from secure care is that the child is not receiving adequate rehabilitative treatment at the facility at which he is placed. A child placed in a secure care facility or non-secure care facility may simply not be receiving the services that were identified by the court and other expert evaluators. For instance, if the client was placed in custody for the purpose of receiving sexual offender treatment services and the facility in which the child is placed is failing to provide adequate services in this area, counsel should bring this to the court's attention and present an alternative placement option that would ensure the provision of such needed services.

While most OYD-run secure care and non-secure care facilities have mental health programming, sometimes a child falls through the cracks and does not receive the services he clearly needs. It is the job of the juvenile court to ensure that the child is placed in an environment where he will receive needed services. Therefore, a motion for modification requesting an alternative placement or release is appropriate, so that the child can receive the necessary rehabilitative services.

E. Benefit of Parole and Aftercare Prior to Outright Release

Another theory in favor of early release from State custody is the need for children to receive transition services and supervision services for a period of time after they have been held in custody. A child who has been held in a secure care facility will benefit more from the services that she received there and will adjust better upon return to her community if she is released prior to the end of her dispositional term, also referred to as the "set date," and is able to benefit from transition and parole services provided by the State.

The need for effective aftercare planning has been thoroughly substantiated by research, both locally and nationwide. A study of recidivism in Orleans and Jefferson Parish noted that in Jefferson Parish, "...youth released from secure custody reoffended at a significantly lower rate [42%] than their peers who remained in custody [72%] for the duration of their sentence."[27] The study also notes that youth who spend most of their formative years "in the system" are especially in need of aftercare services, such as job placement and education assistance.[28]

Aftercare has been proven to be a pivotal factor in determining an ex-offender's chance of success outside of secure care. Young people who have not had the opportunity to develop the skills necessary for adult life—such as becoming literate, holding a legitimate job and maintaining healthy interpersonal relationships—need assistance in acquiring these skills after incarceration in order to transition effectively and to prevent recidivism.[29] Additionally, those youth who have had mental

27 Metropolitan Crime Commission, *Juvenile Recidivism in Metropolitan New Orleans* 17–18 (1999).
28 *Id.* at 18.
29 *See* David M. Altschuler & Rachel Brash, *Adolescent and Teenage Offenders Confronting the Challenges and Opportunities of Reentry*, 2 Youth Violence & Juv. Just. 72, 75 (2004).

health treatment and medicinal monitoring need to maintain such treatment during reentry.[30]

III. INVESTIGATION AND PREPARATION

The level of investigation necessary to write a motion to modify and prepare for a modification hearing will vary depending on when involvement in the case began. Ideally, the same attorney will represent a youth from petition and answer, through the adjudication and disposition, and into post-disposition matters. If counsel has been representing the child throughout the delinquency process, an extensive investigation should already have been completed and the child's educational, mental health, social, and juvenile court history should be familiar. However, if counsel is new to the case, information in all of these areas still needs to be gathered to prepare adequately for a modification proceeding. Counsel should review Chapter 7 of this manual on developing an attorney-client relationship and client interview techniques, and Chapter 12 on adjudication preparation as guides in investigating and preparing for a modification proceeding.

A. Interviewing the Client

It is important that counsel continue to maintain a relationship with the client even after disposition, and that there is follow-up regarding her treatment and progress in secure or non-secure care. Visiting the client in secure care, if geographically feasible, should occur at least once a month. If this is not possible, an alternative is to correspond with the client through the mail or arrange telephone conversations through counsel for OYD or the client's facility counselor. At least one in-person interview will be necessary before a modification hearing so that counsel can discuss procedures with the client face-to-face and prepare her for the hearing. If representation commences at the post-disposition stage, it is crucial for counsel to visit the child and meet her in person. Visiting the client in a secure care facility also may provide an opportunity to meet facility staff and the client's counselor, who often will be used as a crucial witness at the hearing. Moreover, regular visits provide counsel with opportunities to see the conditions of the facility in which the client is being held.

Discussions with the client of a possible modification should cover the client's testimony about her experiences at the facility, including detailed information about school, counseling, mental health treatment, medical treatment, nutrition, exercise, social life, interactions with staff, etc. Counsel should ask the client if she has ever been disciplined at the facility and obtain the specifics about the reason for and nature of the discipline. Counsel also will want to obtain all of the client's institutional records or review her file at the facility and should question the client about the information found therein. Important details to consider include the content of

30 *Id.*

the client's meetings with her counselor, the kinds of group counseling sessions she attends, the classes she is taking, any goals she has reached, and any improvements she has made educationally, behaviorally or otherwise. If the client has had disciplinary or behavior problems, counsel should determine the cause of them. For instance, it may be that the client is being manipulated into misbehaving by other children, or that she is simply bored and unchallenged. It is also possible that the client's erratic behavior is the result of harassment by facility staff, overcrowded living quarters or failure to receive her prescribed medication. Finding out the root cause of negative behaviors can allow counsel to provide the court with a logical explanation of the client's actions. The client also may have a valid explanation for incidents which resulted in disciplinary actions. For example, the client may have received a disciplinary ticket for fighting, but he may claim that another youth attacked him and that he was acting in self-defense. Hence, understanding and being familiar with the client's institutional experiences will aid in preparing the modification hearing.

B. Interviewing Counselors, Probation Officers, and Teachers

In anticipation of a modification hearing, it is important to interview as many people in contact with the client as possible, including the client's counselors, teachers and security staff at the facility. Counsel should speak to the child's probation officer, who should be involved in the client's institutional staffings and should be kept informed by the facility of the client's progress. Occasionally, OYD staff may refuse to speak with attorneys representing children and will state that they are forbidden from discussing the child's case. If this happens, counsel should contact an attorney with OYD to obtain permission for the staff member to speak. There are currently OYD staff attorneys at Swanson Center for Youth in Monroe and at Bridge City Center for Youth in Bridge City. OYD headquarters also house two staff attorneys who can assist with problems in the Baton Rouge area and, specifically, at Jetson Center for Youth in Baker. If the OYD attorney is resistant to the idea of an interview, counsel can emphasize the limited scope of such an interview, which would focus primarily on obtaining information about the client's progress. Alternatively, counsel may suggest that the OYD attorney participate in a group conference call, as opposed to a one-on-one interview.

During interviews with facility staff members, counsel should ask specific questions about the client's behavior at the facility. Staff should address problems and give detailed information about any disciplinary incidents or problems that come up. Counsel should ask staff about issues that appear in the child's file to get more specific information or obtain clarification. Also, counsel should make sure to ask each staff member to identify improvements or positive behaviors of the child. The staff should discuss the child's readiness to return to his home and community and identify services that would be needed as the child transitions back into society. Finally, counsel should ask whether the facility is recommending that the child be released from its care and, if not, what the child has to do in order to obtain such a recommendation.

Once counsel has had the opportunity to talk with staff members at the facility, counsel should subpoena those who will support the theory for modification to testify at the hearing.

C. Interviewing Family

Interviewing family members is also important in preparing for a modification proceeding. Family members who are actively involved in their client's rehabilitation and who visit regularly, communicate with facility counselors and teachers, and participate in facility staffings can be an invaluable tool in obtaining information about the client's experiences and progress at the facility. Moreover, it is important to involve the child's family in identifying needs and services for the child upon release and in the development of a release plan. Family members also need to be in agreement regarding early release and placement of the child. Ideally, either counsel or an investigator on staff will visit the family at their home. For purposes of a modification of disposition, it will be important to have an understanding of the client's home life and any potential problems so that appropriate services or alternative placements can be identified as needed.

A parent's willingness to accept a child back in the home and assist the child with enrollment in school, attendance at mental health appointments, and other activities often will carry a great deal of weight before the judge. Not surprisingly then, if a child's family is not in agreement about the child's readiness for release from secure care, the court will be much less likely to grant an early release. However, even under these circumstances, there are other options to consider and discuss with the client, including group homes and independent living programs.

D. Collecting Records

Obtaining records from the secure care facility where the client is being held is also essential in the development of a motion for modification and preparation for the corresponding hearing. To obtain these records, counsel should present OYD with a court order of enrollment in the case, which also states that counsel has access to OYD records. An alternative method is an authorization of release of information and/or retainer agreement signed by the client if she is age 17 or older, or signed by the client and her parents or guardian if she is under 17. OYD institutional files can be extensive depending on the length of time that the client has spent in secure care. If visitation of the client at the facility is possible, it is advisable that counsel review the file there and request copies only of the documents that are needed. Documents in the OYD file which may be essential in post-disposition representation include progress reports to the juvenile court issued on a quarterly basis, notification of injuries sent to the court, disciplinary records, accident and injury reports which indicate reasons for infirmary visits, biopsychosocial reports prepared by OYD upon the client's intake into the secure care system, psychological and psychiatric evaluations, counseling and treatment notes, group counseling notes, educational records and OYD screening documents.

Some of the records mentioned above also may be obtained from the client's court file, including progress reports to the court, notification of injury forms, and notification of changes in placement. Obtaining such documents from the court file may be less time-consuming and result in quicker access to the documents.

E. Considering Expert Assistance

Under certain circumstances, counsel may need to consider expert assistance in a modification proceeding. Expert advice can be utilized in the development of a release plan, in analyzing OYD records to assess the effectiveness or quality of services being provided, and through testimony regarding the child's readiness for release or need for an alternative placement and services.

F. Talking with State Representatives in Advance of Hearing

Prior to a modification hearing, or even the filing of a motion for modification, counsel should make efforts to speak with the district attorney, probation officer and attorneys for OYD. Before contacting these parties, counsel should have investigated the case and should have an idea of the release plan that will be presented. The goals of making these contacts are to 1) determine whether such persons will be allies or opponents in the efforts for a modification; 2) advocate for and present a favorable picture of the client in an effort to gain their support for the modification; and 3) discover their arguments against the modification, so that preparation for the hearing can be more thorough.

IV. PREPARING A RELEASE PLAN

Preparing a release plan is an integral part of preparing a motion for modification. Counsel should not only be prepared to argue before the court that the client should not be in secure care, but should also be ready to present a viable alternative to the court. All of the guidelines and recommendations discussed in Chapter 16 on the development of a dispositional plan are again applicable in this context. Counsel should work with the client and his family to identify needs and relevant services in the community. Depending on the circumstances of the client's case, it may be wise to have a few alternative dispositional plans ready to present to the court. For instance, although the client may want to return home, if it becomes clear that the court will not support such an outcome, counsel should be prepared to present information about group homes or independent living situations as an intermediary stage between secure care and home.

V. MODIFICATION HEARING

Modification hearings are governed by the minimal standards of due process afforded in adult evidentiary hearings and probation hearings.[31] The usual procedural requirements of dispositional hearings also apply to modification hearings.[32]

Counsel should prepare for the modification hearing according to Chapter 16 of this manual, which addresses preparation for the initial disposition hearing. The primary goals during the modification hearing should be to: a) challenge the suitability of the current placement according to the theory for modification; b) present a viable plan for release or modification to a less secure setting; c) counter opposition from the district attorney and OYD in some cases; and d) weave the factual basis for the modification recommendation into the applicable law.

A. Challenging Suitability of Current Placement

Through the presentation of evidence, counsel should present to the court a challenge to the suitability of the current placement due to inappropriateness, abuse or conditions problems, lack of necessary services, exhaustion of rehabilitation programs, or the need for transition services and parole supervision. Evidence can be presented in the form of testimony of the child's counselors, teachers, facility security staff, parents, expert witnesses and, in some circumstances, the child.

B. Presenting the Plan for Release or Modification

Counsel should have a release plan completed prior to the hearing. The plan should be comprehensive, realistic and logical. Ideally, the parents of the child will have assisted in the development of the plan and will be able to testify to its appropriateness and their willingness to comply with it. Testimony or letters from programs or facilities that have agreed to work with the child will also be helpful. Program staff can discuss the services they can offer and, ideally, will state that the child is already accepted to participate in the program upon his release or transfer. Under some circumstances, expert witnesses can be useful in presenting a release plan by testifying about the child's needs and the ability of the child's parents and community to meet those needs through specific programming and services.

C. Countering Opposition from District Attorney or OYD

Counsel should be prepared to counter arguments that will be made by the district attorney or OYD in opposition to the modification. The district attorney will likely present evidence about the seriousness or heinousness of the crime, will highlight any disciplinary problems that the child has had in secure care, and will argue that the release of the child will present a danger to the community or the victims. Potential arguments to contradict these points include the following:

31 *In re Sterling,* 441 So.2d 372, 374 (La. App. Ct. 1983) (holding that minimum due process requirements apply to modification proceedings); *In re Wright,* 387 So.2d 75, 79 (La. App. Ct. 1980); La. Child. Code Ann. art. 913 (2006).
32 La. Child. Code Ann. art. 893 (2006); La. Child. Code Ann. art. 901 (2006).

1. The purpose of a juvenile disposition is rehabilitation, and the circumstances of the delinquent act committed by the child are relevant to punitive responses and punishment, but are not appropriate considerations for a determination of modification;

2. There is no evidence that the child is a danger to himself or the community;

3. The child has been rehabilitated and has exhibited exemplary behavior in the facility, evidencing that he is no longer a danger to himself or the community;

4. The terms of release can provide for the child to have no contact with the victim or his family, thus avoiding any perceived future danger to the victim; and/or

5. There is a reasonable explanation for any disciplinary or behavior problems and counsel can provide a description of the ways in which the proposed alternative dispositional plan will better address those problems for the child.

D. Weaving the Factual Basis into the Law

Counsel should discuss before the court the laws regarding the purposes of juvenile court and secure custody in delinquency cases. Counsel should address constitutional standards regarding a child's right to treatment and his right to be protected from abuse. The court should be able to see how the facts of the client's case support her right to a modification of disposition in accordance with the court's obligation to ensure treatment and rehabilitation.

VI. EFFECT OF MODIFICATION DECISION

If the juvenile court is convinced that a modification of disposition is appropriate, the court may modify the disposition by ordering alternative conditions and terms as allowed by the Children's Code and as discussed earlier in this chapter. The court may release the child to the custody of his parents, recommend the child's placement in a less secure setting in the custody of OYD or a private institution, place the child on parole, or even release the child from juvenile court supervision altogether.

If a disposition of custody is modified and the child is placed on parole, the maximum term of parole shall be the remainder of the sentence originally imposed.[33] Also note that although the court can recommend that the child be transferred from a secure care OYD placement to a non-secure OYD placement, the child is under the sole control of OYD while in OYD custody.[34] Although the court can make recommenda-

33 La. Child. Code Ann. art. 898(B) (2006).
34 *In re T.A.*, 00-2560, 4-5 (La. 12/07/01); 801 So.2d 351, 353-54; *see also In re Sapia,* 397 So.2d 469, 474 (La. 1981).

tions for treatment and specific OYD placements, OYD is free to adopt or disregard those recommendations. Unfortunately, this means that a court cannot force OYD to place a child in a group home when OYD has determined that the child belongs in secure care. However, OYD does attempt to abide by the preferences of juvenile court judges and is likely, in most cases, to follow the court's suggestion. In cases in which OYD does not follow the court's recommendation by transferring the child to a less secure setting, counsel can advise the court of this at a later review hearing or in a supplemental motion for modification and request that the court modify the disposition again and order the release of the child from OYD custody so that alternative placements can be effectuated.

If the court denies the motion for modification, efforts to obtain a modification and the release of the client should not end. Many judges will not modify a disposition upon the first motion for modification. Sometimes, they will schedule additional review dates and will advise the child that if he continues his positive behavior for a specified number of days, completes one or more treatment programs, or complies with other conditions that the judge will consider modification at the next review hearing.

Other judges will deny the motion outright. When a motion for modification is denied, counsel has a number of options to continue to advocate for the release of the client or for some other modification of his disposition.

A. Supervisory Writ

If the judge's denial of modification appears to be an abuse of discretion and contrary to the purpose of the Louisiana juvenile justice system, counsel can request appellate review of the denial by seeking supervisory writs on the judge's decision. See *Chapter 20: Appeals and Extraordinary Writs* for an overview of the Louisiana writ process.

B. Continued Advocacy at Review Dates

If the judge denies the motion for modification, a review hearing should be requested within the specified number of days. At each subsequent review hearing, counsel can continue to present evidence of the client's progress or of the conditions problems to urge the court to change its mind and modify the client's disposition. Also, alternative theories in favor of the disposition may affect the judge's decisions. Some judges will be convinced over time that modification is the appropriate remedy, and it will certainly instill confidence in the child to know that someone is continuing to advocate for her release.

C. Filing Additional Motions for Modification

Along with continued advocacy at review hearings, and particularly if the court has refused to order any subsequent review hearings, counsel should consider additional motions for modification. Additional motions can present an argument for modification based on an alternative theory, can reveal evidence of changed circumstances from the first motion, and can be a source of pressure on the court to change its mind and modify the disposition. Although additional motions can be a useful source of

aggressive advocacy, counsel should be careful not to frivolously file the same motion over and over again. Each motion should contain new information and new arguments to present to the court and should be spaced out over a reasonable period of time to increase the chances that the judge will take the matter under serious consideration.

CHAPTER 19

DEFENDING AGAINST A MOTION FOR REVOCATION OF PROBATION OR PAROLE

If a judgment of disposition is entered against a child which places that child on probation, or if the child is released from custody and placed on parole, the child likely will have a number of terms and conditions that he must follow in order to remain in compliance with the court's order. If the child fails to comply with those terms and conditions, it may result in the revocation of probation or parole and the placement of the child in secure care, or the imposition of more intensive terms and conditions of probation or parole. Before revocation can occur, the child is entitled to a contradictory hearing. It is the role of counsel for the child to challenge the revocation in court and to advocate for continued release of the child and for the maintenance of reasonable probationary terms. This chapter discusses the procedure for revocation of probation or parole, possible consequences once revoked and tactics for advocates to utilize to prevent revocation.

I. REVOCATION PROCEDURE

Generally, the child's probation officer will notify the court of the child's failure to comply with probationary terms and will request revocation. A request for revocation of probation or parole must be filed in the form of a motion and must be accompanied by a supporting affidavit that specifies the violations which form the basis for the revocation.[1] The child is entitled to notice and to receive a copy of the motion and the supporting affidavit.[2]

Upon the filing of a motion for revocation, the court must conduct a contradictory hearing, unless the child waives his right to a hearing. The child is entitled to the following due process protections at the hearing:

> (1) The right to confront and cross-examine adverse witnesses;
>
> (2) The right to appear and to present witnesses on his own behalf; and
>
> (3) The right to have the State bear the burden of proving by clear and convincing evidence that the child violated a condition of probation contained in the order of disposition entered by the court against him.[3]

1 La. Child. Code Ann. art. 913(A) (2006)
2 *Id*; *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)); *State in the Interest of Sterling*, 441 So.2d 372, 374 (La. App. 5 Cir. 1983); *State in the Interest of Wright*, 387 So.2d 75, 77 (La. App. 4 Cir. 1980).
3 La. Child. Code Ann. art. 913(B) (2006).

The hearing may be informal and summary in nature, and the court has discretion in the receipt and consideration of evidence presented within the limits of the child's constitutional rights, even if such evidence would not be admissible at an adjudication.[4]

The role of the advocate is to ensure that the due process protections guaranteed a child facing revocation of probation or parole are in place. Potential problems and opportunities for advocacy include:

(1) **Lack of Notice:** If the child or the attorney were not provided notice of the revocation hearing or provided a copy of the motion for revocation, the advocate should object to the hearing and request notice and a continuance so that he will have the opportunity to prepare for the contradictory hearing to which the client is entitled.

(2) **Insufficiency of Motion Due to Inadequate Affidavit:** If a motion for revocation does not contain an affidavit alleging the specific acts constituting the violation, counsel should object to the sufficiency of the motion and ask that it be denied for its failure to comport with the requirements of the Children's Code. Receiving a revocation motion without being advised of the basis for the revocation is like receiving no notice at all as it does not allow the opportunity for preparation to contradict the allegations in a hearing.

(3) **Witness Confrontation:** The attorney should ensure the appropriate witnesses are present in court and take advantage of the opportunity to cross-examine them regarding the alleged violation. If crucial witnesses with firsthand knowledge of the alleged violation are not present, counsel must request that they be compelled to appear, or argue that the State cannot meet its burden without their presence.

(4) **Compel the State to Meet Its Burden:** The State must prove a violation of probation or parole by "clear and convincing evidence." Many juvenile courts have become relaxed in handling revocation hearings and often accept, without challenge, hearsay evidence and mere allegations of violations resulting in revocation. The State should be compelled to prove through compelling evidence that the client did in fact violate his probation. Counsel has a duty to challenge allegations that are made through the presentation of contradictory evidence, and to utilize creative arguments to convince the court that no violation occurred or that the violation was so minor that it should not result in any significant consequences for the child.

Revocation of parole or probation is a serious matter that can result in severe consequences for the client. Providing zealous advocacy at this stage of proceedings

4 La. Child. Code Ann. art. 913(C) (2006).

not only protects the child from unnecessary and unmerited consequences, but also reminds the court system that revocation is a serious matter and that due process protections apply. Therefore, preparing for the revocation hearing as if it were a mini-adjudication hearing is essential. This preparation necessitates that the attorney, at minimum, request and review relevant documents, speak with witnesses, interview the client, and prepare for an adversarial hearing.

II. CONSEQUENCES IF A VIOLATION OF PROBATION OR PAROLE IS FOUND

If, after the contradictory hearing, the court determines that the child has violated a term or condition of probation, the court may do any of the following which are consistent with the best interests of the child and the public:

> (1) Reprimand or warn the child;
>
> (2) Order that supervision of the child be intensified;
>
> (3) Impose additional terms of probation;
>
> (4) Extend the period of probation within the limitations of Articles 898 and 900 of the Children's Code; and/or
>
> (5) Order that probation be revoked and execute the suspended sentence that was ordered as part of the disposition.[5]

In the event that the child has repeatedly violated the terms of the judgment of disposition, the court also may find the child to be in direct or constructive contempt of court and commit the child to a local detention center.[6] However, the child may only be held in the same dormitory, room or area used to house other children being held in contempt of court.[7] In addition, the child may be placed in detention only for a period of 15 days for each order of contempt.[8]

If the child is committed to the OYD due to the revocation of probation or parole, the term of commitment may not exceed the maximum term of imprisonment for the offense forming the basis for the original jurisdiction, and the child shall receive credit for any time served in detention prior to the revocation hearing.[9] If the child has violated probation by the act of illegally possessing a firearm, the court must revoke probation and order the child committed to OYD.[10]

If the conduct that was the cause of the child's revocation of probation constituted another delinquent act, a new petition may be filed against the child subjecting him

5 La. Child. Code Ann. art. 914(A) (2006).
6 La. Child. Code Ann. art. 914(C) (2006).
7 *Id.*
8 La. Child. Code Ann. art. 915(B) (2006).
9 La. Child. Code Ann. art. 915(A) (2006).
10 La. Child. Code Ann. art. 914(B) (2006).

to another adjudication for that charge, in addition to any consequences the court imposes for the violation of the probation.[11]

The court has a great deal of discretion in responding to a violation of probation. Counsel should utilize creative arguments to convince the court to select a consequence that is appropriate, given the circumstances. In some situations, it may be appropriate to develop a proposal or alternative dispositional plan for the client to present to the court at a revocation hearing. It could be that the prior treatment measures put in place are not meeting the child's needs.

The advocate should explore the reasons for the violation of the probation and discuss alternative solutions with the client and his family. Under some circumstances, expert consultation or testimony is necessary in a revocation hearing in order to present evidence that the terms of probation are not appropriate for the particular child, and to present alternative probationary conditions that may suit the child's needs more adequately. For instance, if the client was ordered to go to school, but the school is not offering the services the client needs because of a disability, an alternative to revocation may include placement in an alternative school or forcing the school to provide the needed services.[12] In preparing for a revocation hearing, counsel also should consider the same kinds of arguments and suggestions one might make in the context of a dispositional hearing.[13]

11 La. Child. Code Ann. art. 915(C) (2006).
12 *See* Chapter 6, *supra*, for ideas on addressing school-related issues.
13 *See* Chapter 16, *supra*, regarding disposition.

CHAPTER 20
APPEALS AND EXTRAORDINARY WRITS

Appellate advocacy is typically less prevalent in juvenile delinquency cases than in adult criminal cases. This is likely because the dispositions for juveniles are not as severe as adult sentences. As a result, judgment calls are made about the value of spending time on appellate work. However, appellate practice in delinquency representation is crucial to preserve the rights of children and to push juvenile court judges to adhere to the laws.

Louisiana provides for the expedited handling of appeals involving juvenile delinquency cases. Hence, resolution of an appeal in the child's favor can affect even short dispositions.[1] This chapter provides an overview of appellate and post-disposition representation, including information on how to file an appeal or supervisory writ, a habeas petition and a writ of mandamus, and how to advocate for a juvenile client under Louisiana's post-conviction guidelines.

I. APPELLATE PRACTICE

A. Appeals Generally

1. Right to Appeal

Any party to the proceedings or any other party in interest shall have the right to appeal a judgment in a delinquency case. However, the State may not appeal from a judgment refusing to adjudicate a child delinquent or from a judgment of acquittal.[2]

2. Final Judgment

An appeal may be taken from any final judgment of a court and shall be filed with the appropriate court of appeal.[3] In a delinquency case, an appeal may only be taken after a judgment of disposition.[4]

3. Jurisdiction

The appropriate appellate court for the filing of an appeal or supervisory writ is the regional circuit court within which the district or juvenile court is located. There are five Louisiana Appellate Courts: Circuit 1 serves the Florida Parishes, East Baton Rouge and surrounding region; Circuit 2 serves the Northern section of the state;

1 La. Child. Code Ann. art. 337 (2006).
2 La. Child. Code Ann. art. 331 (2006).
3 La. Child. Code Ann. art. 330(A) (2006).
4 La. Child. Code Ann. art. 330(B) (2006).

Circuit 3 serves the Western region; Circuit 4 serves the Orleans, Plaquemines and St. Bernard region; and Circuit 5 serves the Jefferson Parish region of the state.[5]

B. Perfecting an Appeal

1. Deadlines

Appeals from a judgment of disposition must be filed within *15 days* from the mailing of the judgment of disposition or, if a timely application for a new trial is filed, within 15 days of the mailing of the notice denying the motion for a new trial.[6]

2. Form

An appeal is initiated by obtaining an order from the district court which rendered the judgment being appealed.[7] An order of appeal may be obtained by oral motion, written motion or petition. The order issued must specify a return date for the appeal with the appellate court.[8]

3. Notice of Appeal

Notice of the appeal, once ordered, is sent by the clerk of the court to all other parties to the action automatically and to the party seeking the appeal upon request.[9] The clerk of court is also responsible for sending a copy of the notice of appeal to the proper appellate court within seven days of the order.[10]

4. Return Date

The return day for the appeal may be set by the juvenile court, but may not exceed 30 days from the date the appeal is granted.[11] The trial court may grant one 30-day extension on the return date. However, all other extensions must be obtained from the appellate court.[12] The Uniform Rules of Louisiana Courts of Appeals provide that no extension of the return date can be granted except upon a showing of "extraordinary circumstances."[13]

5. Preparation of the Record

Once an appeal is granted and a return date is set by the court, the clerk of the juvenile district court must prepare the record and lodge it with the appellate court on or before the return date.[14] If the child requests a transcript of proceedings for the

5 Louisiana Supreme Court, *Maps of Judicial Districts: Louisiana Courts of Appeal Circuits, available at* www.lasc.org/about_the_court/map02.asp (last visited June 2, 2006).
6 La. Child. Code Ann. art. 332(A) (2006).
7 La. Child. Code Ann. art. 333(A) (2006).
8 La. Child. Code Ann. art. 333(B) (2006).
9 La. Child. Code Ann. art. 333(C) (2006).
10 La. Cts. App. Unif. R. 2-2.1 (2006).
11 La. Child.Code Ann. art. 334(A) (2006).
12 La. Child. Code Ann. art. 334(B) (2006).
13 La. Cts. App. Unif. R. 5-3(a) (2006).
14 La. Child. Code Ann. art. 335(A) (2006).

appeal, the child or his parents shall pay the cost of the transcription, unless they lack the means to do so.[15]

When making a motion for an order of appeal, counsel may request that the client be found indigent, unless already determined by the court, and that all fees associated with the appeal and preparation of records and transcripts be waived. Additionally, counsel should request the preparation of transcripts of any relevant proceedings in the delinquency case for inclusion in the record. Having a complete and comprehensive record for appeal is essential to counsel's ability to advocate adequately for the client on appeal.

C. Effect of Filing the Appeal

Filing an appeal will not result in the suspension of the judgment appealed, unless the trial judge specifically orders such a suspension.[16] If the circumstances of the case merit a suspension of the judgment, the advocate must include a prayer for the suspension and present reasons therefore in the motion for appeal with the juvenile court.

D. Procedures Before the Appellate Courts

Each Louisiana Appellate Court has adopted local rules which govern the court's procedures. Local rules of the appellate court that will review the child's case should be examined to avoid any sanctions or the possibility of offending the court prior to its review of the case.[17] Practice before the Louisiana Appellate Courts is also regulated by the Uniform Rules of Louisiana Courts of Appeals. These rules provide guidance regarding the form and substance of brief writing, requests for oral arguments, timelines, and the procedures for appellate practice. Advocates should review both the uniform rules and local rules carefully when initiating an appeal.

The uniform rules specifically call for the expedited handling of appeals from decisions in delinquency cases, stating, "[a]ppeals and writ applications in such cases shall be assigned by preference to the next docket or cycle following any required briefing schedule."[18] The rules further provide that appellate courts shall render opinions expeditiously in delinquency cases to "allow release on or before the next regularly scheduled opinion release date following the cycle or docket in which the case was submitted."[19]

15 La. Child. Code Ann. art. 335(D) (2006).
16 La. Child. Code Ann. art. 336(A) (2006).
17 *See* Louisiana Supreme Court, *Links: Other Courts and Associations, available at* www.lasc.org/links.asp (last visited June 5, 2006) (containing links to the websites of the various Louisiana Appellate Courts that provide local rules and other tips on brief writing and appellate practices).
18 La. Cts. App. Unif. R. 5-3(b) (2006).
19 La. Cts. App. Unif. R. 5-3(e) (2006).

1. Scope of Review

Appellate courts in Louisiana have the authority to accept supervisory writs and appeals from the juvenile courts within their circuit.[20] An appellate court will only review issues which were "submitted to the trial court and which are contained in specifications or assignments of error, unless the interest of justice clearly requires otherwise."[21] In delinquency and criminal cases, appellate jurisdiction extends only to questions of law, and not questions of fact.[22]

2. Request for Oral Argument

Upon the filing of an appeal, parties shall have the opportunity to file briefs presenting their assignments of error and questions of law. They then may argue their side of the case in court, if permitted by the court in question. Appellate courts do not automatically schedule oral arguments in the cases that come before them.

If an advocate wishes to argue her case orally before the court of appeal, she must make a written request to do so within *14 days* after the date the record was filed.[23] This request can be made in the form of a letter sent to the court. Generally, a timely request for an oral argument will be granted, unless the case is assigned for summary disposition. When a request for oral argument has been granted, all parties are given the opportunity to make an oral argument, unless a party has forfeited that right.[24]

3. Requirements for Briefs

The Uniform Rules of Louisiana Courts of Appeals provide for specific guidelines for the preparation of briefs to be presented to the courts, ranging from paper color and margin size to the number of copies to be filed. The following is an overview of these procedures. It is crucial, however, that an attorney carefully review the complete uniform rules and comply with them in the preparation and filing of his briefs.

a) Filing Timelines and Number of Copies

In an appeal taken from a judgment in a delinquency case, the brief of the appellant shall be filed within *15 calendar days* after the filing of the record. The brief of the appellee must be filed within *30 calendar days* after the filing of the record, and the reply brief, if any, shall be filed *within 5 calendar days* after the appellee's brief is filed.[25] Each party shall file an original and seven copies of the brief in every case.[26]

If the brief on behalf of any party is not filed by the specified date, the party's right to oral argument is forfeited. The court also may impose other sanctions including, but not limited to, dismissal of the appeal.[27]

20 L.A. Const. art. V, § 10(A).
21 La. Cts. App. Unif. R. 1-3 (2006).
22 L.A. Const. art. V, § 10(B); La. Child. Code Ann. art. 803, 808 (2006).
23 La. Cts. App. Unif. R. 2-11.4 (2006).
24 *Id.*
25 La. Cts. App. Unif. R. 5-3(c)(1) (2006)
26 La. Cts. App. Unif. R. 2-12.1 (2006).
27 La. Cts. App. Unif. R. 2-12.12 (2006).

b) Preparation of Briefs

Briefs must be prepared with black ink on legal- or letter-sized white, unglazed, opaque paper and can be printed, typewritten or produced by any copying process, so long as the copies are legible. The text must be double-spaced, except for matters that are customarily single spaced, with a 1″ margin, and the pages shall be numbered consecutively.[28] Footnotes can be single-spaced, but cannot be utilized to circumvent the page and space limitations. The type size of all briefs must be Roman or Times New Roman 14-point font or larger, or no more than 10-characters-per-inch typewriter print.[29]

Original briefs filed by the appellant shall not exceed 28 pages on legal-sized paper, or 38 pages on letter-sized paper. The appellee's reply brief shall not exceed 13 pages on legal-sized paper, or 18 pages on letter-sized paper. These page restrictions do not include the cover page, jurisdictional statement, syllabus, assignment of errors and issues presented for review.[30]

If a case can not be adequately presented under the page and space limitations provided, a motion for leave to file a brief in excess of the page limitation may be filed. The motion must be filed at least *10 days* in advance of the due date of the brief and will only be granted for "extraordinary and compelling reasons."[31]

The cover page of the brief must include the following:

(a) the title of the court to which it is directed;

(b) the docket number of the case in the court;

(c) the title of the case as it appears on the docket of the court;

(d) the name or title of the court and the parish from which the case came;

(e) the name of the judge who rendered the judgment or ruling complained of;

(f) a statement as to whether the case comes before the court on appeal or in response to a writ;

(g) a statement identifying the party on whose behalf the brief is filed and the party's status before the court;

(h) the nature of the brief, whether original, in reply or supplemental;

(i) the name of counsel, with address and telephone number, by whom the brief is filed, and a designation of the parties represented, and a designation of "appeal counsel"; and

28 La. Cts. App. Unif. R. 2-12.2 (2006).
29 *Id.*
30 *Id.*
31 *Id.*

(j) the designation of whether the case is a civil, criminal, juvenile or special proceeding.[32]

To protect the confidentiality of minors, all references to minors party to or whose interests are the subject matter in the proceeding shall be identified using initials in all filings and in opinions.[33]

c) Specific Requirements for Appellant's Brief

In addition to the above requirements, the brief filed by the appellant must include:

(1) a statement of the jurisdiction of the court;

(2) a concise statement of the case;

(3) the action of the trial court;

(4) a specification or assignment of all alleged errors;

(5) the issues presented for review;

(6) an argument confined strictly to the issues of the case, free from unnecessary repetition, giving accurate citations of the pages of the record and the authorities cited;

(7) a short conclusion stating the precise relief sought; and

(8) a copy of the judgment, order or ruling complained of and a copy of either the trial court's written reasons for judgment, transcribed oral reasons for judgment or minute entry of the reasons.[34]

d) Specific Requirements for Appellee's Response Brief

The requirements for the appellee's brief are identical to those for the appellant's brief, except that the appellee's brief need not aver a statement of jurisdiction, the facts or the relevant issues, unless the appellee considers the statements of the appellant to be insufficient or incorrect. The appellee's response brief "should contain appropriate and concise answers and arguments and reference to the contentions and arguments of the appellant."[35]

e) Appellant's Reply Brief

The appellant may file a reply brief if he has timely filed an original brief. The reply brief must be "strictly confined to rebuttal of points urged in the appellee's brief."[36]

32 La. Cts. App. Unif. R. 2-12.3 (2006).
33 La. Cts. App. Unif. R. 5-2 (2006).
34 La. Cts. App. Unif. R. 2-12.4 (2006).
35 La. Cts. App. Unif. R. 2-12.5 (2006).
36 La. Cts. App. Unif. R. 2-12.6 (2006).

f) Case Citation Requirements

Citations to Louisiana cases must conform to Section VIII of the Louisiana Supreme Court General Administrative Rules. With other cases, counsel must cite to the volume and page of the official reports and to the unofficial reports when possible. Citations to United States Supreme Court cases must include all three reporters. If the case cited is from another state, a copy of the decision must be attached to the brief.[37]

g) Sanctions

Briefs that fail to comply with the uniform rules may be stricken in part or in whole by the court, and the delinquent party may be compelled to file a new or amended brief.[38]

4. Application for Rehearing

If the appellate court rules against the child on appeal, she has the right to file an application for rehearing to ask the appellate court to reconsider its decision. "An application for rehearing shall state with particularity contentions of the applicant and shall contain a concise argument in support of the application."[39]

An application for rehearing may be only 10 pages long, unless permission from the court is obtained to file a longer application.[40] An original and four copies of the application and a brief in support of the application must be filed with the court.[41] Oral arguments are not allowed on rehearing applications.[42]

An application for rehearing must be filed within 14 days of the judgment of the appellate court. No extensions on such applications will be granted.[43] Rehearing applications in cases involving delinquency matters shall be decided by preference of the court.[44]

II. SUPERVISORY JURISDICTION AND REVIEW: WRIT PRACTICE

The Louisiana Children's Code specifically provides that supervisory writs may be utilized in juvenile delinquency cases. Writs should be made to the appropriate appellate court with jurisdiction over the juvenile court issuing the ruling.[45] Supervisory writs should be filed to challenge interlocutory decisions by the juvenile court, such as findings regarding evidentiary matters, probable cause determinations,

37 La. Cts. App. Unif. R. 2-12.4 (2006).
38 La. Cts. App. Unif. R. 2-12.13 (2006).
39 La. Cts. App. Unif. R. 2-18.1 (2006).
40 *Id.*
41 La. Cts. App. Unif. R. 2-18.1, 2-18.3 (2006).
42 La. Cts. App. Unif. R. 2-18.1 (2006).
43 La. Cts. App. Unif. R. 2-18.2 (2006).
44 La. Cts. App. Unif. R. 5-3(f) (2006).
45 La. Child. Code Ann. art. 338 (2006).

pre-adjudicatory custody decisions, bail determinations and denials of motions to modify. In the interests of judicial efficiency and fairness to the parties, an appellate court may review an interlocutory or final judgment pursuant to its supervisory jurisdiction, even though the judgment could be reviewed pursuant to an appeal.[46]

A. Procedure for Requesting a Supervisory Writ

The process for applying for a supervisory writ commences by providing notice to the trial court and opposing parties of an intention to seek a writ on the decision of the court.[47] This notice can be provided by orally stating, in open court, the child's desire to seek a writ on the finding of the court, or by filing a written Notice of Intent to Seek Writ. Counsel should simultaneously notify the court that she wishes to seek a writ and request that the judge set a return date for the application to the appellate court.[48] The judge will then immediately establish a reasonable return date before which the application must be filed in the appellate court.[49]

The return date set by the juvenile court judge shall not exceed 15 days from the date of the ruling in question.[50] A written request for an extension for the filing of the application may be requested within the return date period, but will be granted by the trial court or the appellate court only upon a showing of "extraordinary hardship."[51]

B. Application for Writ

The application for writ, and all connecting documents and exhibits, shall be filed in an original and three duplicate copies with the clerk of the appropriate court of appeal.[52] The application will not be considered by the court if it is improperly filed.[53] When filing a writ, it is the responsibility of the attorney to obtain and attach all relevant court orders, pleadings, transcripts, and minute orders to the application. The clerk of court does not prepare and lodge a record for a supervisory writ.

Supporting briefs to the application for writ must be filed with the application. Briefs in opposition shall be filed prior to the decision by the court or as ordered by the court.[54] If counsel decides to write a brief in opposition to an application for writ filed by the State, he should file the brief as soon as possible or contact the clerk of the appellate court to advise the court that he wishes to file such a brief. Because the court will be making a decision on the issues expeditiously, an attorney must be prepared to act quickly. Counsel may not have the opportunity to review the opponent's

46 *See, e.g., Chambers v. LeBlanc*, 598 So. 2d 337 (La. 1992); *Winston v. Martin*, 34,195 (La. App. 2 Cir. 07/06/00); 764 So. 2d 368; *Smith v. Louisiana Dept. of Public Safety*, 571 So. 2d 666 (La. Ct. App. 1990); *Hamilton Medical Group v. Ochsner Health Plan*, 550 So. 2d 290 (La. Ct. App. 1989).
47 La. Cts. App. Unif. R. 4-2 (2006).
48 *Id.*
49 La. Cts. App. Unif. R. 4-3 (2006).
50 La. Cts. App. Unif. R. 5-3(d) (2006).
51 La. Cts. App. Unif. R. 5-3 (2006).
52 La. Cts. App. Unif. R. 4-1 (2006).
53 *Id.*
54 La. Cts. App. Unif. R. 2-12.10 (2006).

brief before filing a brief in objection, and the court is not required to wait to make a decision until the opposing brief has been filed.[55]

1. Stay of Proceedings Pending Decision

Proceedings in juvenile court may be stayed pending the outcome of a filed application for writ at the judge's discretion. A request for a stay of proceedings pending the outcome of the application should be made to the juvenile court.[56]

2. Expedited Consideration

If requesting expedited consideration of an application, the application cover sheet shall include a statement in bold print indicating that expedited consideration is requested. There also must be a statement within the application, entitled "REQUEST FOR EXPEDITED CONSIDERATION," averring the justification for the request and a time limit within which action by the appellate court is sought.[57] Applications in delinquency cases should be given expedited consideration due to the nature of the case according to the Children's Code and the Uniform Rules. If a stay or a priority consideration is requested, the applicant must establish in an affidavit that the trial court and all parties and their counsel have been notified by telephone, or other equally prompt means of communication, that the writ application is about to be or has been filed, and that the trial court and all parties have been served by the same delivery means as used to effect the filing with the appellate court.[58]

3. Contents of Writ Application

The application for writ must contain documentation of the return date and any extensions, or it will not be considered by the appellate court.[59]

According to the Louisiana Uniform Rules of Courts of Appeal, "[t]he original application for writs shall be signed by the applicant or counsel of record, and shall contain an affidavit verifying the allegations of the application and certifying that a copy has been delivered or mailed to the respondent judge and to opposing counsel, and to any opposing party not represented by counsel. The affidavit shall list all parties and all counsel, indicating the parties each represents. The affidavit also shall list the addresses and telephone numbers (if available) of the respondent judge, opposing counsel and any opposing party not represented by counsel. The original and duplicate shall have the pages of the application and attached documents and exhibits consecutively numbered and shall contain these items:

(a) an index of all items contained therein;

(b) a concise statement of the grounds on which the jurisdiction of the court is invoked;

55 La. Cts. App. Unif. R. 4-7 (2006).
56 La. Cts. App. Unif. R. 4-4(A) (2006).
57 La. Cts. App. Unif. R. 4-4(B) (2006).
58 La. Cts. App. Unif. R. 4-4(C) (2006).
59 La. Cts. App. Unif. R. 4-3 (2006).

(c) a concise statement of the case;

(d) the issues and questions of law presented for determination by the court;

(e) the assignments or specifications of errors and a memorandum in support of the application, in accordance with Rules 2-12.2 and 2-12.10, and a prayer for relief;

(f) a copy of the judgment, order or ruling complained of (if by written judgment, order or ruling);

(g) a copy of the judge's reasons for judgment, order or ruling (if written);

(h) a copy of each pleading on which the judgment, order or ruling was founded;

(i) a copy of pertinent court minutes; and

(j) the notice of intent and return date order..."[60]

III. WRIT OF HABEAS CORPUS

A. Habeas Generally

"A writ of habeas corpus is a writ commanding a person who has custody of another person to appear before the court and provide authority for maintaining that custody."[61]

B. Grounds for Relief

If the person named in the application for writ is being held without a court order, the court may determine whether to release the person from custody as "justice may require."[62]

"If the person in custody is being held by virtue of a court order, relief shall be granted only on the following grounds:

1) The court has exceeded its jurisdiction;

2) The original custody was lawful, but by some act, omission, or event, which has since occurred, the custody has become unlawful;

3) The order for the custody is deficient in some legal requisite;

4) The order for the custody, although legal in form, imposes an illegal custody;

60 La. Cts. App. Unif. R. 4-5 (2006).
61 La. Code Crim. Proc. Ann. art. 351 (2006).
62 La. Code Crim. Proc. Ann. art. 361 (2006).

5) The custodian is not the person allowed by law to detain the person in custody;

6) He has been denied his right to a hearing in an extradition case, as provided in Article 267; or

7) He is being held in custody prior to trial in violation of due process of law."[63]

A person held in custody cannot be granted a writ of habeas corpus if she may appeal or has appealed, and the appeal is pending.[64]

C. Venue

The appropriate venue for a habeas corpus proceeding is the parish in which the person is being held in custody.[65]

D. Burdens of Proof

If the person named in the application for writ is being held without a court order, the burden is on the custodian to prove the legality of the custody and to show good cause why the person should not be released.[66]

If the person named in the application is being held pursuant to a court order, she retains the burden of proving the custody is illegal and that she is entitled to be released.[67]

E. Form

A writ of habeas corpus must be made by a written petition to a competent person by the person in custody or on his behalf.[68] A copy of any court order serving as the basis for the custody must be attached to the petition or the petition must allege that a copy of the order has been demanded and refused.[69] The petition also must contain:

1) The name of the person in custody;

2) The place of custody, or if unknown, a statement to that effect;

3) The name of the custodian, or if unknown, a description or designation of him;

4) A statement of facts upon which the petition is based, supported by affidavits;

63 La. Code Crim. Proc. Ann. art. 362 (2006).
64 La. Code Crim. Proc. Ann. art. 363 (2006).
65 La. Code Crim. Proc. Ann. art. 352 (2006).
66 La. Code Crim. Proc. Ann. art. 365 (2006).
67 *Id.*
68 La. Code Crim. Proc. Ann. art. 353 (2006).
69 *Id.*

5) A prayer for the issuance of the writ of habeas corpus; and

6) A signature of the applicant and an affidavit that the allegations are true to the best of the affiant's information and belief.[70]

F. Procedure

Once the application for writ of habeas corpus has been filed, the court receiving the application shall immediately grant a writ, unless it is clear from the petition itself or documents attached to the petition that the person in custody is not entitled to liberty.[71] The writ issued shall establish a time and place for the answer, which shall be as early as practicable, but shall not exceed 72 hours from the issuance of the writ.[72]

1. Answer

Upon the time and place indicated for the answer in the writ, the person upon whom the writ has been served must file a written answer stating whether he has custody of the person named in the writ and, if so, the basis of his authority for holding the person in custody.[73] Both the answer and the person being detained must be brought to court at the time and place indicated by the court which issued the writ.[74] If the person cannot be brought before the court, the reasons shall be stated in the answer.[75] If the court is content with the reasons given for the failure to produce the person named in the writ, the hearing can proceed without her presence. Otherwise, the court may demand that the person be immediately brought before the court.[76]

If the person named in the writ has been transferred to the custody of another prior to the service of the writ, the person upon whom the writ was served must file an answer that states the person to whom custody was transferred and his address, the time and authority for the transfer, and the place where the person is currently being held in custody.[77]

2. Hearing

At the time and place set within the writ, the court shall hold a hearing.[78] Evidence and reasons presented by the person held in custody and by the custodian shall be heard by the court.[79]

70 *Id.*
71 La. Code Crim. Proc. Ann. art. 354 (2006).
72 *Id.*
73 La. Code Crim. Proc. Ann. art. 357 (2006).
74 *Id.*
75 La. Code Crim. Proc. Ann. art. 359 (2006).
76 *Id.*
77 La. Code Crim. Proc. Ann. art. 358 (2006).
78 La. Code Crim. Proc. Ann. art. 360 (2006).
79 *Id.*

3. Judgment

If the court determines that the person named in the writ is being illegally detained, the court may enter a judgment ordering the release of that person. If the State has announced its intention to apply for a supervisory writ and the person is being held by virtue of a court order or in connection with a felony, then the person may not be released for 48 hours after the entering of the judgment or until the application for supervisory writ has been denied, whichever occurs first.[80]

Any person failing to comply with a writ of habeas corpus or a judgment rendered in response to an application for such a writ is subject to punishment for contempt of court.[81]

G. Writs and Appeals from Habeas Decisions

A supervisory writ is the proper form of challenge to a judgment made in response to an application for a writ of habeas corpus.[82] If the State has announced it will apply for a supervisory writ and the person is being held due to a court order, or in connection with a felony, then the person will not be released for 48 hours after the judgment is entered, or until the application for supervisory writ has been denied, whichever occurs first.[83]

IV. WRIT OF MANDAMUS

A writ of mandamus is an extraordinary writ requesting that a court compel a lower court, municipal corporation or administrative, executive or judicial officer to perform a ministerial act or mandatory duty where there exists a clear legal right. The writ of mandamus has traditionally been used in situations of abuse of judicial power. The Louisiana Code of Civil Procedure provides: "[a] writ of mandamus may be directed to a public officer to compel the performance of a ministerial duty required by law, or to a former officer or his heirs to compel the delivery of the papers and effects of the office to his successor."[84]

A writ of mandamus is considered "an extraordinary remedy which should be applied only where ordinary means fail to afford adequate relief."[85] The writ should be issued only in "cases where the law provides no relief by ordinary means or where the delay involved in obtaining ordinary relief may cause injustice...."[86] A mandamus will be issued only "when there is a clear and specific legal right to be enforced or a

80 La. Code Crim. Proc. Ann. art. 370 (2006).
81 La. Code Crim. Proc. Ann. art. 368 (2006).
82 La. Code Crim. Proc. Ann. art. 369-370 (2006).
83 La. Code Crim. Proc. Ann. art. 370 (2006).
84 La. Code Civ. Proc. Ann. art. 3863 (2006).
85 *Bd. of Trs. of Sheriff's Pension & Relief Fund v. City of New Orleans*, 02-0640, 2 (La. 05/24/02); 819 So.2d 290, 292 (citing *La. Assessors' Retirement Fund et al. v. City of New Orleans et al.*, 01-735 (La. 02/26/02); 809 So.2d 955); *Smith v. Dunn*, 268 So.2d 670, 672 (La. 1972).
86 La. Code Civ. Proc. Ann. art. 3862 (2006).

duty which ought to be and can be performed. This writ is never granted in doubtful cases...."[87]

In the rare circumstance that a writ of mandamus may be appropriate in a delinquency case, the writ should be filed in the form of a petition to the superior court with jurisdiction over the court or municipality that has breached its duty to your client.

V. POST-CONVICTION PROCEDURES IN DELINQUENCY MATTERS

The Louisiana Children's Code does not provide for post-conviction or post-adjudication procedures. Therefore, it is necessary to turn to the Louisiana Code of Criminal Procedure guidelines for post-adjudication relief procedures. Such procedures are applicable in delinquency matters.[88]

A. Post-Conviction Relief Generally

An application for post-conviction relief, or post-adjudicatory relief in delinquency matters, is a petition requesting that the adjudication and disposition be set aside.[89] Post-conviction relief is not available if the child may appeal the adjudication and disposition, or if an appeal is pending.[90]

B. Grounds for Relief

Possible grounds for post-adjudication relief include where:

> 1) The conviction was obtained in violation of the Constitution of the United States or the state of Louisiana;
>
> 2) The court exceeded its jurisdiction;
>
> 3) The conviction or sentence subjected him to double jeopardy;
>
> 4) The limitations on the institution of prosecution had expired;
>
> 5) The statute creating the offense for which he was convicted and sentenced is unconstitutional;
>
> 6) The conviction or sentence constitute the ex post facto application of law in violation of the Constitution of the United States or the state of Louisiana; or
>
> 7) The results of DNA testing performed pursuant to an application granted under Article 926.1 proves by clear and convincing evidence

87 *State ex rel. Hutton v. City of Baton Rouge*, 47 So.2d 665, 669 (La. 1950).
88 La. Child. Code Ann. art. 803 (2006).
89 La. Code Crim. Proc. Ann. art. 924(1) (2006).
90 La. Code Crim. Proc. Ann. art. 924.1 (2006).

that the petitioner is factually innocent of the crime for which he was convicted.[91]

C. Venue

An application for post-adjudicatory relief must be filed in the parish in which the child was adjudicated delinquent.[92]

D. The Evidentiary Hearing

Unless the application fails to state a claim that would entitle the petitioner to relief,[93] or the issues raised can be resolved based on the application and supporting documents,[94] the court shall order an evidentiary hearing for the taking of testimony and other evidence on the issues raised in the application.[95] The petitioner has the burden of proving that relief should be granted.[96]

E. Application and Petition

An application for post-adjudicatory relief must be filed in writing at the district court in which the child was adjudicated delinquent.[97] A copy of the judgment of adjudication and disposition must be attached, or it must be stated if the petitioner demanded a copy but was refused.[98]

The petition must allege the following:

> 1) The name of the person in custody and the place of custody, if known, or if not known, a statement to that affect;
>
> 2) The name of the custodian, if known, or if not known, a designation or description of him as far as possible;
>
> 3) A statement of the grounds upon which relief is sought, specifying with reasonable particularity the factual basis for such relief;
>
> 4) A statement of all prior applications for writs of habeas corpus or for post-conviction relief filed by or on behalf of the person in custody in connection with his present custody; and
>
> 5) All errors known or discoverable by the exercise of due diligence."[99]

The petitioner must sign the application and submit an affidavit affirming that the allegations set forth in the petition are true to the best of his information and belief.[100]

91 La. Code Crim. Proc. Ann. art. 930.3 (2006).
92 La. Code Crim. Proc. Ann. art. 925 (2006).
93 La. Code Crim. Proc. Ann. art. 928 (2006).
94 La. Code Crim. Proc. Ann. art. 929 (2006).
95 La. Code Crim. Proc. Ann. art. 930 (2006).
96 La. Code Crim. Proc. Ann. art. 930.2 (2006).
97 La. Code Crim. Proc. Ann. art. 926(A) (2006).
98 *Id.*
99 La. Code Crim. Proc. Ann. art. 926(B) (2006).
100 La. Code Crim. Proc. Ann. art. 926(C) (2006).

The uniform application for post conviction relief approved by the Louisiana Supreme Court must be used.[101] Failure to abide by the procedures set forth for post-conviction relief in the Code of Criminal Procedure can result in the dismissal of the application.[102]

F. Time Limits

An application for post-adjudicatory relief must be filed within two years after the adjudication and disposition have become final.[103] However, an application may be filed beyond the two-year time limitation if the application alleges and proves that the factual basis for the claim was unknown to the petitioner or his attorney, or that the claim asserted is premised upon a final ruling of an appellate court which established a new interpretation of constitutional law which is retroactively applicable to the case and the petition is filed within one year of the appellate court ruling.[104]

101 La. Code Crim. Proc. Ann. art. 926(D) (2006).
102 La. Code Crim. Proc. Ann. art. 926(E) (2006).
103 La. Code Crim. Proc. Ann. art. 930.8(A) (2006).
104 *Id.*

CHAPTER 21
EXPUNGEMENT OF RECORDS

Records relating to a delinquency case are confidential. Although confidential, those records are generally kept by courts and agencies serving youth charged with delinquent acts. Under some circumstances, those records will be made accessible to the child and other persons over the course of the child's life.

The only way to ensure that a child's delinquency record is truly erased and inaccessible throughout the rest of the child's life is to have the records expunged. Expungement of records essentially causes all records to be erased and destroyed, thereby truly putting the child's delinquency history behind him as he enters adulthood. This chapter discusses the procedures involved in obtaining an expungement of juvenile delinquency records.

I. ELIGIBILITY FOR EXPUNGEMENT

Once a child reaches the age of 17, he may move for expungement of his records of juvenile criminal conduct.[1] The following records are eligible for expungement:

A) Those concerning conduct or conditions that did not result in adjudication;

B) Those concerning conduct or conditions that resulted in a misdemeanor adjudication, but only if two or more years have elapsed since the person satisfied the most recent judgment against him; and

C) Those concerning conduct or conditions that resulted in a felony adjudication, but only if:

1) The adjudication was not for murder, manslaughter, any sexual crime, kidnapping or armed robbery;

2) Five or more years have elapsed since the person satisfied the most recent judgment against him;

3) The person has no criminal court felony convictions and no criminal court convictions for misdemeanors involving a weapon; and

4) The person has no outstanding indictment or bill of information charging him.[2]

1 La. Child. Code Ann. art. 917 (2006).
2 La. Child. Code Ann. art. 918 (2006).

II. PROCESS FOR OBTAINING EXPUNGEMENT OF RECORDS

A motion for expungement must be made in writing and state the grounds for expungement.[3] The request must be filed with the court possessing the records the person seeks to expunge, or with the court having authority over the arresting agency.[4] The motion must be served on the district attorney, the clerk of the court in control of the records and the head of the agency whose records counsel seeks to expunge, if applicable.[5]

A contradictory hearing shall be held with the district attorney and any agency whose records are sought to be expunged, unless the parties consent to waive this hearing.[6] The court may order the expungement if it finds the applicant is entitled to it.[7]

An order for expungement shall be served on both the district attorney and the head of the agency whose reports or records are to be expunged, if applicable.[8] The order shall specify the time within which the records must be destroyed, as well as the limitations on any information which may be maintained.[9]

III. EFFECT OF EXPUNGEMENT OF RECORDS

Except for a few exceptions, an expunged record is to be considered nonexistent and treated as such upon any inquiry.[10]

A. Order of Expungement Regarding Court Records

An order of expungement shall be in writing and shall oblige the clerk of court to destroy all records involving the conduct or conditions referred to in the motion for expungement. This includes, but is not limited to, all pleadings, exhibits, reports, minute entries, correspondence and other documents.[11]

If a document cannot be destroyed, it may be maintained, but under no condition may it be released. However, the court can keep a confidential record, such as a minute entry, indicating that an adjudication occurred. This information is to be released only upon written motion of a court having criminal jurisdiction over the person whose record is sought, and then only for purposes authorized by the Code of Criminal Procedure.[12]

3 La. Child. Code Ann. art. 919(B) (2006).
4 La. Child. Code Ann. art. 919(C) (2006).
5 La. Child. Code Ann. art. 919(D) (2006).
6 La. Child. Code Ann. art. 919(E) (2006).
7 La. Child. Code Ann. art. 919(F) (2006).
8 La. Child. Code Ann. art. 921(C) (2006).
9 La. Child. Code Ann. art. 921(B) (2006).
10 La. Child. Code Ann. art. 922 (2006).
11 La. Child. Code Ann. art. 920(A) (2006).
12 La. Child. Code Ann. art. 920(B), (C) (2006).

B. Order of Expungement Regarding Agency Records

According to the Louisiana Children's Code, an order for the expungement of juvenile records must be in writing and must require that both of the following occur:

> 1) Except as otherwise provided by law, all officials, agencies, institutions, boards, systems and law enforcement offices, and their employees, agents and consultants, destroy all reports and records whether on microfilm, computer memory device or tape, or any other photographic, fingerprint or any other information of any kind and all kinds or descriptions relating to the conduct or conditions referred to in the motion for expungement; and
>
> 2) Any and all such agencies and law enforcement offices file an affidavit with the court attesting to the fact that such records have been destroyed and that no notation or references have been retained in any central depository which will or might lead to the inference that any record ever was on file with that agency or law enforcement office.[13]

The custodian of reports and records of the agency or office may keep a copy of the expungement order. Only upon written order of the court may the custodian disclose the fact that such judgment is kept or that the expunged record previously existed.[14]

13 La. Child. Code Ann. art. 921(A) (2006).
14 La. Child. Code Ann. art. 921(D) (2006).

APPENDIX

APPENDIX A

AUTHORIZATION TO DISCLOSE PROTECTED HEALTH AND OTHER INFORMATION (HIPAA)

I,_____ [name of client], (SS#_____), authorize the following entities and individuals to release information regarding my medical, personal, educational, employment, institutional, social, criminal, and psychological history to Attorney_____ [name of juvenile defender], and to such other staff of the _____ [name of law office], as my attorney shall designate.

In accordance with the Health Insurance Portability and Accountability Act (HIPAA), and the Privacy Rule regulations found at 45 C.F.R. § 164.501 (2002), et seq., the dates of service for which the information is requested are from my date of birth on_____ _____ [Month Day, Year] to the date of this release. *See* 45 C.F.R. § 164.

In accordance with HIPAA, this authorization to release information will expire on/upon _____. [date or event that will terminate authorization].

I understand and direct that the purpose of releasing protected health information is for use by my attorney in assisting me in my pending cases. I understand that information used or disclosed pursuant to this authorization may be subject to redisclosure by my attorney for purposes related to my legal representation. I understand that such disclosures by my attorney will not be protected by HIPAA privacy rules.

The HIPAA "minimum necessary" standard does not apply to this request for disclosure to the individual who is the subject of the information. I am specifically requesting that all records and information in the possession or control of the entity or individual named above should be provided to my lawyer (or members of my defense team).

"Information" includes typewritten or handwritten recordings of interviews, notes (including handwritten notes), log entries, records of all kinds, memoranda, electronic recordings, audio tapes, video tapes, compact disks, correspondence, emails, computerized records, other records, reports and data entries of any kind. This release authorizes copying, by photocopy or otherwise, and transmission of said documents, via fax or other appropriate means.

I reserve the right to revoke this authorization in writing by sending a dated letter signed by me to any or all of the entities and persons named below.

The entities and individuals to whom this release is directed are as follows:

1) Hospitals, clinics, physicians, therapists, psychiatrists, nurses, psychologists and any other medical or mental health professionals and personnel;

2) Educational institutions, schools and vocational programs, including educational programs for learning disabled persons, programs for educationally or mentally disabled persons and special education programs;

3) School counselors, teachers, professors, principals, vice-principals, psychologists, therapists, nurses and any and all other school personnel;

4) Jail, prison or law enforcement personnel, including police personnel, sheriff personnel, guards, prison officials, social workers, psychologists, psychiatrists, doctors, nurses and mental health-related personnel;

5) All court and judicial personnel, including clerks, judges, designated workers, probation officers, social workers, court reporters, court deputies and court secretaries;

6) Office of Youth Development, Department of Social Services, other state or local social service agencies or departments, offices of child protective agencies, caseworkers, social workers, nurses, assigned homemakers and special assistance personnel;

7) Records custodians of any of the above-named entities.

All persons, agencies or corporations who would have claims of confidentiality or privilege on behalf of the undersigned are hereby released from all claim of privilege or confidentiality related to information provided pursuant to this release. Claims of Privilege include all claims and protections pursuant to state, local and federal statutes and constitutional provisions.

A photocopy of this release is intended to have the same force and effect as the original.

Client Signature | Parent Signature

Printed Name | Date

ALL FORMER RELEASES SHALL BE DECLARED VOID

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APPENDIX B

CLIENT INTERVIEW QUESTIONS

CLIENT INFORMATION

- Name(s) (including any aliases):
- Date of birth ("DOB"):
- Description of client (race, ethnicity, age, size, hair color and length, any obvious tattoos or identifying characteristics):
- Place of birth:
- Primary language:
- Religious affiliation:

FAMILY INFORMATION

- Mother's name:
- DOB/age:
- Address:
- Telephone numbers (or numbers of a relative or friend where messages can be left):
- Place of birth:
- Marital status:
- Primary language:
- Employer, employer address and phone number:
- Siblings living with mother (names and ages):
- Siblings living in area (names and ages):
- Others living with mother (names and ages):
- Father's name:
- DOB/age:
- Address:
- Telephone numbers (or numbers of a relative or friend where messages can be left):
- Place of birth:
- Marital status:
- Primary language:
- Employer, employer address and phone number:
- Siblings living with father (names and ages):
- Siblings living in area (names and ages):
- Others living with father (names and ages):
- Name of other significant adult:
- Relationship to Client:
- Address:
- Telephone numbers (or numbers of a relative or friend where messages can be left):
- Name of other significant adult:
- Relationship to Client:
- Address:

- Telephone numbers (or numbers of a relative or friend where messages can be left):
- Primary caretaker/legal guardian (if different from parents):
- Relationship to Client:
- How long has s/he been the client's guardian?
- Other siblings in the home (names and ages):
- Other children in the home (names and ages):
- Others residing in the home? (names and ages):
- Has the client been placed out of the home before? When and why?
- Client's description of home situation:
- What was the client's childhood like?
- Did the client participate in a Head Start or Early Intervention program?

FRIENDS

- Does the client have close friends? How many? Who? How old?
- What does the client do with friends?
- Does the client's family know the client's friends? Why or why not?
- Are any of the client's friends involved with the court system? How many? How involved?

EDUCATION

- Last grade placement:
- Grades completed:
- Contact person/someone trusted at school:
- Does the client have an Individualized Educational Program ("IEP")?
- When was IEP last reviewed?
- Are IEP services being provided (i.e., tutoring, specialized classes, counseling services, speech or other therapies)?
- ADD/ADHD diagnosis? Age diagnosed?
- Difficulties/issues:
- Strengths/positives:
- Extracurricular activities at school:
- Client's feelings about school:
- Client's grades:
- Does the client skip classes? How often?
- History of suspensions and expulsions:
- Any suspensions or expulsions this school year? Why?
- Any safety concerns at school, or traveling to or from school?

EMPLOYMENT AND COMMUNITY ACTIVITY

- Work history:
- Current employment:
- Employment interests:
- Volunteer involvement:
- Community activity or church involvement:

PHYSICAL/MENTAL HEALTH

- Health insurance:
- Hospital clinic affiliation:
- Last medical/dental appointment:
- Any medical issues/needs?

- History of head trauma or lead poisoning?
- Prescribed medications (past or present):
- Who prescribed medications? Name of the doctor and clinic or hospital?
- Is there a family history of mental health problems/substance abuse?
- Is there a client history of mental health problems/substance abuse?
- Is there a history of counseling (individual or family)?
- Is there a history of suicidal/homicidal ideation, attempts and/or self-injurious behavior?
- Mental health diagnoses:

TRAUMA/LOSS

- Has there been any significant trauma or loss in the client's life (e.g., loss of a family member or friend, witness to a violent crime, separation from a close relative)?

SUBSTANCE ABUSE

- Does client use any controlled substances or alcohol?
- Has substance use caused the client any problems?
- Was the client under the influence of any substances when arrested for this charge or any other charges?
- Does the client consider substance use to be a problem?
- Have others commented or shown concern over the client's substance use?

SELF-INTEREST/PERCEPTIONS

- What are three things the client likes about him/herself?
- What are three things others like about him/her?
- What are some of the client's accomplishments?
- Name something positive about client that s/he would like others to know:
- Describe the client's monthly activities:
- What are the client's hobbies/interests?
- What does client foresee in his/her future with respect to goals and short-term/long-term plans?

LEGAL HISTORY

- Has the client been to juvenile court before? Why?
- Was the client charged with any previous delinquent or criminal acts?
    - For each:
    - When?
    - For what charges?
    - Which judge?
    - Was the client detained?
    - What was the outcome of the case?
    - What were the probation/secure care outcomes?
- Did the client have an attorney? Does s/he remember the attorney's name? Did the attorney help?
- Has the client ever been on probation before?
    - For each:

- When?
- For what charges?
- What were the terms?
- Who was the probation officer?
- Was probation revoked?
- Were there efforts to revoke?

§ Has the client ever been placed in a group home as a result of delinquency charges?

- When?
- Where?
- For what charges?

• Has the client ever been placed in secure care?

- When?
- Where?
- Did the client get an early release?
- Paroled?
- Was parole ever revoked? If so, why?

CURRENT CHARGES

• Advise the client about current charges and allegations of delinquency.

• When did it happen?

• Where did it happen?

• Who else was present?

• What happened? (*Note:* It is important to ask open-ended questions and follow-up questions to obtain detailed information about the incident.)

• What happened afterward? (Did the client flee, walk away, get apprehended?)

• When was the first police contact? Where? Describe in detail the extent of contact and interaction with the police, as well as the circumstances of the arrest.

• Describe police report statements and solicit response from the client regarding accuracy.

• Were there witnesses present? If so, what did they see?

• Does the client have any relationship with the victims, co-defendants, or witnesses?

QUESTIONS GEARED TOWARD ASSESSING COMPETENCY

• How old are you?

• When is your birthday? In what year were you born? (*Note:* If the child cannot provide the year, this should be a red flag.)

• What school do you go to?

• What grade are you in? (Consider whether the grade is appropriate for the age of the child or whether the child is behind in school.)

• What courses are you studying?

• Are the courses age-appropriate, or do they suggest special education placement?

• How many days of school do you miss in an average week? Why? How many times each week are you late for school? (*Note:* Truancy may be an indicator of special education problems.)

• Who are your doctors?

- How often do you see your doctor? Why?
- Have you ever talked with a therapist or psychologist? Why?
- Have you ever been in the hospital? Why?
- Are you taking any medications? What are they? Why are you taking them?
- How do the medications make you feel? Better? Worse? Side effects?
- How often do you take the medicine?
- Do you ever drink alcohol? How often? How much do you drink at one time? When did you last drink?
- Do you use other illegal drugs? Which ones? How often? How much do you use at one time? When did you last use drugs?

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APPENDIX C

PARENT INTERVIEW QUESTIONS

GENERAL INFORMATION

- Name:
- DOB/age:
- Address:
- Telephone numbers (or numbers of a relative or friend where messages can be left):
- Place of birth:
- Marital status:
- Primary language:
- Employer, employer address and phone number:
- Siblings living with this parent (names and ages):
- Siblings living in area (names and ages):
- Others living with this parent (names and ages):
- Other parent's name:
- DOB/age:
- Address:
- Telephone numbers (or numbers of a relative or friend where messages can be left):
- Place of birth:
- Marital status:
- Primary language:
- Employer, employer address and phone number:
- Siblings living with other parent (names and ages):
- Siblings living in area (names and ages):
- Others living with other parent (names and ages):
- Name of other significant adult:
- Relationship to Client:
- Address:
- Telephone numbers (or numbers of a relative or friend where messages can be left):
- Name of other significant adult:
- Relationship to Client:
- Address:
- Telephone numbers (or numbers of a relative or friend where messages can be left):
- Primary caretaker/legal guardian (if different from parents):
- Relationship to Client:
- How long has s/he been the client's guardian?
- Other siblings in the house (names and ages):
- Other children in the house (names and ages):

- Others who reside in the house? (names and ages):
- Has the client been placed out of the home before? When and why?
- Parent's description of home situation:
- What was the client's childhood like?
- Did the client participate in a Head Start or Early Intervention program?

FINANCIAL INFORMATION

- Salary of both parents, if employed (gross and net):
- Amount of unemployment benefits, if received:
- Supplemental income (e.g., social security):
- Welfare or public assistance payments, if received:
- Value of significant assets (e.g., home, automobile, bank account, real property):
- Liabilities (e.g., debts, installment payments, mortgages):
- Number of dependents:

FRIENDS

- Does the client have close friends? How many? Who? How old?
- What does the client do with his/her friends?
- Does the family know the client's friends? Why or why not?
- Are any of the client's friends involved with the court system? How many? How involved?

EDUCATION

- Last grade placement:
- Grades completed:
- Contact person/someone trusted at school:
- Does the client have an Individualized Educational Program ("IEP")?
- When was IEP last reviewed?
- Are IEP services being provided (i.e., tutoring, specialized classes, counseling services, speech or other therapies)?
- ADD/ADHD diagnosis? Age diagnosed?
- Difficulties/issues:
- Strengths/positives:
- Extracurricular activities at school:
- Client's feelings about school:
- Client's grades:
- Does the client skip classes? How often?
- History of suspensions and expulsions:
- Any suspensions or expulsions this school year? Why?
- Any safety concerns at school or traveling to or from school?

PHYSICAL/MENTAL HEALTH

- Health Insurance:
- Hospital or clinic affiliation:
- Last medical/dental appointment:
- Any medical issues/needs?
- History of head trauma or lead poisoning?
- Prescribed medications (past or present):

- Who prescribed medications? Name of doctor and clinic or hospital?
- Is there a family history of mental health problems/substance abuse?
- What is the client's history of mental health problems/substance abuse?
- Is there a history of counseling (individual or family)?
- Is there a history of suicidal/homicidal ideation, attempts and self-injurious behavior?
- Mental health diagnoses:

TRAUMA/LOSS

- Has there been any significant trauma or loss in the client's life (e.g., loss of family member or friend, witness to a violent crime, separation from a close relative)?

SUBSTANCE ABUSE

- Does the client use any controlled substances or alcohol?
- Has substance use caused the client any problems?
- Have you or others commented or shown concern over client's substance use?

PERCEPTIONS/ATTITUDE TOWARD CLIENT

- What are three things the parent likes about the child?
- What are some of the child's accomplishments?
- Describe the client's monthly activities:
- What are the client's hobbies/interests?
- What are the parent's goals and hopes for the client's future?

LEGAL HISTORY

- Has the client been to juvenile court before? Why?
- Was the client charged with any previous delinquent or criminal acts?
    - For each:
    - When?
    - For what charges?
    - Which judge?
    - Was the client detained? What was the outcome of the case?
    - What were the outcomes of probation/secure care?
- Did the client have an attorney? Does s/he remember the attorney's name? Did the attorney help?
- Has the client ever been on probation before?
    - For each:
    - When?
    - For what charges?
    - What were the terms?
    - Who was the probation officer?
    - Was probation revoked?
    - Were there efforts to revoke?
- Has the client ever been placed in a group home as a result of delinquency charges? When? Where? For what charges?

- Has the client been placed in secure care? If so, when? Where? Did client get an early release? Was the client paroled? Was parole ever revoked? If so, why?

CURRENT CHARGES

- Are you familiar with the allegations of delinquency in this case?
- Do you have any personal knowledge of the incident?
- If so, when did it happen? Where did it happen? Who else was present? What happened?
- Do you or the client have a relationship with the victims, co-defendants or witnesses?

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ACKNOWLEDGMENTS

JUVENILE JUSTICE PROJECT OF LOUISIANA